Office-Supreme Court, U.S.
FILED
JAN 22 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 776

THE MOSES H. CONE MEMORIAL HOSPITAL, ET AL.,
Petitioners

v.

G. C. SIMKINS, ET AL., and UNITED STATES OF AMERICA, Intervenor,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CHARLES E. ROTH
Greensboro, North Carolina
Counsel for Petitioners The Moses H. Cone Memorial Hospital and Harold Bettis

THORNTON H. BROOKS
Greensboro, North Carolina
Counsel for Petitioners, Wesley Long Community Hospital, Inc., and A. O. Smith

INDEX

	Page
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
1. The Receipt of Federal Funds Under Hill-Burton Act Does Not Constitute State Action	6
2. Not Necessary or Proper to Determine the Constitutionality of § 291e(f) of Hill-Burton Act	11
3. Constitutionality and Severability of § 291e(f)	15
Conclusion	18

Appendix

1. Judgment of the Court of Appeals	A 1
2. Opinion of the Court of Appeals	A-3
3. Findings of Fact, Conclusions of Law and Opinion of the District Court	A-38
4. Constitutional Provisions, Statutes, and Regulations	A-65
5. Extracts from Legislative History of Hill-Burton Act	A-69
6. Examples of Federal Grants-in-Aid to Colleges and Private Institutions	A-73

CITATIONS

CASES	Page
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	10, 13
Civil Rights Cases, 109 U. S. 3 (1883)	13
Eaton v. Board of Managers of James Walker Memorial Hospital, 261 F. 2d 521 (4th Cir. 1958), cert. denied, 359 U. S. 984 (1959)	10, 12
Engel v. Vitale, 370 U. S. 421 (1962)	9
Marsh v. Alabama, 326 U. S. 501 (1946)	9
Muskrat v. United States, 219 U. S. 346 (1911)	13
School District of Abington v. Schempp, 374 U. S. 203 (1963)	9
Turner v. City of Memphis, 369 U. S. 350 (1962)	12
United States v. Congress of Industrial Organization, 355 U. S. 106 (1948)	14-15

STATUTES	
Civil Rights Act, 42 U.S.C. § 1983	3, 4
Hospital Survey and Construction Act (Hill-Burton Act)	
42 U.S.C. § 291e (f)	3, 4, 16
42 U.S.C. § 291m	3, 7, 18
Title 28 U.S.C. § 1254 (1)	2
Title 28 U.S.C. § 2403	5, 14

REGULATION	
42 C. F. R. 53.112, 21 Fed. Reg. 9841	3

MISCELLANEOUS	
Hill-Burton Program, Progress Report, July 1, 1947-June 30, 1962	10
Address of Mr. Justice John M. Harlan, August 13, 1963	15

IN THE

Supreme Court of The United States

OCTOBER TERM, 1963

No.

THE MOSES H. CONE MEMORIAL HOSPITAL, ET AL.,
Petitioners

v.

G. C. SIMKINS, JR., ET AL.; and
UNITED STATES OF AMERICA, Intervenor,
Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit dated and entered in the above cause on 1 November 1963, reversing a judgment of the United States District Court for the Middle District of North Carolina.[1]

---

[1] Other petitioners than those named in the caption are Harold Bettis, Director of The Moses H. Cone Memorial Hospital, and Wesley Long Community Hospital, a Corporation, and A. O. Smith, Administrator of the Wesley Long Community Hospital. Other respondents than those named in the caption are A. V. Blount, Jr., Walter J. Hughes, Norman N. Jones, Girardeau Alexander, Milton H. Barnes, W. L. T. Miller, E. C. Noel, III, F. E. Davis, A. J. Taylor, and Donald R. Lyons.

CITATIONS TO OPINIONS BELOW

The opinion of the Circuit Court of Appeals, which is printed in the Appendix hereto, *infra*, p. A-3, is reported in 323 F.2d 959.

The opinion of the United States District Court, which is printed in the Appendix hereto, *infra*, p. A-38, is reported in 211 F. Supp. 628.

JURISDICTION

The judgment of the Circuit Court of Appeals sought to be reviewed was dated and entered on 1 November 1963 (Appendix, *infra*, p. A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the mere receipt of Federal funds under the provisions of the Hill-Burton Act by a private non-profit hospital to be used in aid of its own construction program makes all subsequent operations of the hospital State action so as to deprive the hospital of its private character and subject it to the inhibitions of both the Fifth and the Fourteenth Amendments to the Constitution of the United States.

2. Whether the question of the constitutionality of the challenged provisions of the Hill-Burton Act (and of the regulations) should properly be considered by the Court in this action where a resolution of this question is not in any way essential to a decision of the case, and where the Attorney General of the United States has vigorously attacked, and no one in the case has made any effort to defend, the constitutionality of those provisions.

3. If it is deemed appropriate to consider the question of constitutionality in this action, whether the challenged provi-

sions of the Hill-Burton Act (and of the regulations) are actually unconstitutional under the Fifth and the Fourteenth Amendments, and even if they are, whether they may be severed from the remainder of the Act when such an excision has the effect of enacting legislation which has been expressly considered and disapproved by the Congress.

STATUTES INVOLVED

The constitutional provisions involved are the Fifth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. They are printed in Appendix, *infra*, pp. A-65.

The pertinent statutory provisions involved are Sections 291e (f) and 291m of the Hospital Survey and Construction Act (Hill-Burton Act) 60 Stat. 1041 (August 13, 1946), as amended; 42 U.S.C. § 291; and Civil Rights Act, 17 Stat. 13 (April 20, 1871); 42 U.S.C. § 1983. They are printed in Appendix, *infra*, pp. A-63-67.

The pertinent regulation involved is 42 CFR 53.112; 21 Fed. Reg. 9841 (December 12, 1956). It is printed in Appendix, *infra*, p. A-67.

STATEMENT OF THE CASE

The petitioner hospitals are private, non profit corporations chartered in North Carolina, and each has established, owns, and maintains a general hospital in Greensboro, North Carolina. The petitioner Bettis is the Director of Cone Hospital, and the petitioner Smith is the Administrator of Long Hospital. Appendix p. A-41.

Each of the corporations owns in fee simple the real property on which its hospital is located, and the Board of Trustees of each has the exclusive power and control over all real and personal property of the corporation and all the institutional

services and activities of the hospital. Appendix p. A-43. From 1954 through 1961, the petitioner hospitals received substantial grants of Federal funds in aid of their own construction programs pursuant to the terms and conditions of the Hospital Survey and Construction Act (Hill-Burton Act, 42 U.S.C. 291 et seq.) and the regulations issued thereunder. Appendix pp. A-44.

The petitioner Long Hospital denies admission to all Negro patients, and does not grant staff privileges to Negro physicians and dentists. The petitioner Cone Hospital does not grant admission to Negro patients on the same terms and conditions as white patients, and when the complaint was filed, it did not admit Negro physicians and dentists to staff privileges. Appendix p. A-41.

The individual respondents are Negro physicians, dentists, and patients, the physicians and dentists practicing and all residing in Greensboro, and they instituted this action in the United States District Court for the Middle District of North Carolina on February 12, 1962. Appendix pp. A-40. The complaint invoked Federal jurisdiction under 28 U.S.C. 1343(3) as a suit in equity authorized by the Civil Rights Act (42 U.S.C. 1981 and 1983), and under 28 U.S.C. 1331 as an action arising under the United States Constitution involving more than $10,000.00. The action sought to enjoin the petitioners from continuing to deny the admission of physicians and dentists to hospital staff privileges, and the admission of patients to hospital facilities, on the basis of race, and also sought a declaratory judgment that Section 291e(f) of Title 42, United States Code, and Regulation 53.112 of the Public Health Service Regulations issued pursuant thereto, are unconstitutional. R., Vol I, pp. 4a-5a, 17a.

On April 2, 1962, the petitioners moved to dismiss the action for lack of jurisdiction over the subject matter on the ground that it was one brought by individuals seeking redress for the

alleged invasion of their civil rights by private corporations and other individuals; and subsequently both the individual respondents and the United States as intervenor filed motions for summary judgment. R., Vol. I, pp. 19a, 72a, 189a. On June 26, 1962, the District Court entered an order permitting the United States to intervene as a party pursuant to 28 U.S.C. 2403 "to the extent necessary for a proper presentation of the facts and law relating to the constitutionality of" the challenged provisions of the Hill-Burton Act; and on that same date, a full hearing of the case was had in the District Court. At the hearing, it was agreed that there was no dispute as to any material fact; that if the petitioner hospitals were instrumentalities of the State, the injunctive relief sought should be granted; and that if they were not, the Court lacked jurisdiction and the action should be dismissed. Appendix p. A-40.

On December 5, 1962, the District Court filed its findings of fact, conclusions of law, and opinion, and on December 17, 1962, entered a final judgment denying the motions of the respondents for summary judgment and granting the motion of the petitioners to dismiss the complaint and the pleading in intervention. The District Court held that the various contacts the petitioner hospitals had with governmental agencies, both Federal and State, did not make them instrumentalities of government in the constitutional sense, and that the Court had no jurisdiction over the subject matter of the action; and that the constitutionality of the challenged provisions of the Hill-Burton Act was not an issue in, and a declaration as to their constitutionality was not necessary to a disposition of, the case. Appendix pp. A-63.

The respondents appealed, and the Court of Appeals heard the matter sitting en banc. Three of the five judges of the Court of Appeals concluded that the Hill-Burton contacts were sufficient Federal and State involvement to imbue the activities of

the petitioner hospitals with "state action" and bring them within the Fifth and Fourteenth Amendment prohibitions against racial discrimination, and the Court remanded the case to the District Court with directions to grant the requested injunctive relief. The majority also declared the challenged provisions of the Hill-Burton Act (and of the implementing regulations) unconstitutional, and pruned these provisions from the statute. Judge Haynsworth and Judge Boreman dissented from these conclusions, and voted for affirmance. Appendix pp. A-3-37.

REASONS FOR GRANTING THE WRIT

1. The present case would appear to be the first in which it has ever been held that the mere contribution of Federal funds to a private agency is sufficient to characterize the subsequent operations of that agency as State action. "Certainly no court has yet held that the private operation of any endeavor becomes state action merely because its construction or operation has been subsidized by Government. But that is all there is in this case." Judge Haynsworth, dissenting below, Appendix p. A-30.

It is true that a majority of the Court of Appeals in the present case believed it saw something more than mere grants in aid in the Hill-Burton contributions. But Judge Haynsworth and Judge Boreman below called this conclusion "both unprecedented and unwarranted" (Appendix p. A-24); and indeed there would appear to be little warrant for it either in the Hill-Burton Act itself or in the implementing state legislation.

Judge Stanley, in the District Court, pointed out that "at the time of the oral arguments both parties conceded, that the Hill-Burton funds received by the defendant hospitals should be considered as unrestricted funds." Appendix p. A-57. This concession is indicated—it might in truth be thought required—by the legislative history of the Hill-Burton Act which makes it plain that the purpose of the Act was to provide for Federal

grants in aid—gifts of money—"to assist in the construction of public and other nonprofit hospitals. . ."[2]

The Hill-Burton Act itself expressly disclaims any Federal right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital receiving funds under the Act. 42 U.S.C. 291m, Appendix p. A-66. The North Carolina Medical Care Commission (which is the relevant agency of the State of North Carolina) similarly disclaims any authority to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital licensed by it under the North Carolina Hospital Licensing Act, whether such hospital has received or has not received Hill-Burton funds; and the Attorney General of the State of North Carolina has ruled that The North Carolina Medical Care Commission has no such authority. R., Vol. II, pp 1aa-6aa. The Rules and Regulations for Hospital Licensure in North Carolina—which apply without distinction to every hospital in North Carolina whether or not it ever received Hill-Burton funds—specifically provide that "The governing board shall be the supreme authority in the hospital to which the administrator, the medical staff, the personnel, and all auxiliary organizations are directly or indirectly responsible." R., Vol. I, p. 122a.

The District Court concluded in the present case that "no state or federal agency has the right to exercise any supervision or control over the operation of either hospital by virtue of their use of Hill-Burton funds, other than factors relating to the sound construction and equipment of the facilities, and inspections to insure the maintenance of proper health standards . . ." Appendix p. A-59. And two of the judges of the Court of Appeals said "The truth is plain. This scheme for grants in aid to hospitals

---

[2] 42 U. S. C. 291. In reference to the legislative history of the Hill-Burton Act, see Judge Haynsworth below, Appendix p. A-27; and see Appendix pp. A-69-72.

differs neither in kind nor degree from any other provision for grants in aid of private endeavor." Judge Haynsworth, dissenting below, Appendix p. A-33.

The implications of the present decision are staggering. By analogy to it, every Federal grant of funds made upon conditions sufficiently stringent to insure that the funds are used for the purposes for which they are granted would prima facie constitute "state action"—by the Federal government, and if the allocation of Federal funds were made by the State as is frequently the case, then by the State as well. The majority below expressly refused to delineate the "legal rule" it followed,[a] and while it may be true that "not every subvention by the federal or state government automatically involves the beneficiary in 'state action,'" it is equally true that under the decision of the majority every subvention by the federal or state government is automatically suspect until the matter is litigated and the innocence of the grant established—perhaps as here long after it was made. Thus no private person or institution—under the imprecise "legal rule" of this case—could accept any such subvention with any confidence whatever about the retention of its privacy or the extent of its automatic though unwitting obligation.

In this day of prevalent government aid, this uncertainty—even if it is no more than uncertainty—is a high price to pay for a particular result in this particular case. For the analogy is clear and the uncertainty would surely pervade the whole range of government financial aid from Judge Haynsworth's tobacco and soil bank farmers to the private college or university which ac-

---

[a] "Not every subvention by the federal or state government automatically involves the beneficiary in 'state action,' and it is not necessary or appropriate in this case to undertake a precise delineation of the legal rule as it may operate in circumstances not now before the court. Prudence and established judicial practice counsel against such an attempt at needlessly broad adjudication." Appendix p. A-17.

cepts funds for research projects;[4] and it would apply not alone to discrimination but inevitably to all other constitutional safeguards. Thus the legal rule enunciated below would embrace not only the private hospital with a Hill-Burton grant but also the private denominational college with a grant in aid of research from such a Federal source as the Small Business Administration, the National Aeronautics & Space Administration, or the Atomic Energy Commission; and by inevitable extension, it would bar not only discrimination by the college but also its chapel services. *Engel v. Vitale*, 370 U. S. 421 (1962); *School District of Abington v. Schempp*, 374 U.S. 203 (1963) and ct. cf. *Marsh v. Alabama*, 326 U. S. 501 (1946).

The Court of Appeals acknowledged the significance of this case. "Because of the importance of these questions the court, on its own motion, has heard the appeal en banc." Appendix p. A-5. In a speech delivered at the John A. Andrew Clinical Society in Tuskegee, Alabama, on 21 April 1963 Mrs. Constance Baker Motley, of New York, a leading civil rights attorney, said "In my judgment a victory [in the instant case] would be as significant as the school desegregation ruling because of the tremendous number of hospitals in this country receiving Federal financial assistance."

This was not an overstatement of the situation, for in North Carolina alone, there are 132 voluntary non-profit hospitals which have received Federal funds under the Hill-Burton Act, and more than a dozen of these recipients made application with the same reservations as did the two petitioner hospitals; and in thirteen other states, 571 other voluntary non-profit hospitals have received grants of Federal funds under the Hill-Burton Act, including approximately 70 hospitals which are restricted to

---

[4] See Judge Haynsworth below, Appendix p. A-32. For a few examples of Federal aid, see Appendix p. A-73.

whites only. The impact of this case, even in its precise context, is therefore not confined to these present petitioners. And when the legal rule enunciated here is extended—as logic demands—from the relatively narrow range of the Hill-Burton hospitals to the uttermost reaches of all government financial aid to private endeavor, the anomaly is multiplied in geometric progression.

The majority below, in reaching its decision here, overruled or completely disavowed its own prior and quite recent decision in *Eaton v. Board of Managers of James Walker Memorial Hospital*, 261 F. 2d 521 (4th Cir. 1958), cert. denied, 359 U.S. 984 (1959), which might have been thought to control this case. See Judge Haynsworth below, Appendix p. A-33. This disavowal was based on what would appear to be a complete misapprehension of the scope of the decision of this Court in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), despite the express caution of this Court in that decision. For this Court, in *Burton*, emphasized that the case dealt with—and dealt only with—a lease of public property, and said (at p. 726), "Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself."

The *Burton* case (at p. 722) actually reaffirmed the principle which should control the instant case—"that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in

---

[5] The other states are Alabama, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, South Carolina, Tennessee, Virginia, West Virginia, Oklahoma, and Missouri. *Hill-Burton Program, Progress Report* July 1, 1947-June 30, 1962 (Public Health Service Publication No. 930-F-3).

any of its manifestations has been found to have become involved in it"; and the dissenting opinion of Judge Haynsworth below sets forth in detail the reasons why the Hill-Burton grants in aid did not involve the State in the conduct of the petitioners in this case.

2. The District Court found that the petitioners had claimed no right or privilege under the challenged provisions of the Hill-Burton Act; and that there had been no showing that these provisions had resulted in depriving the individual respondents or any other citizens of their constitutional rights. He then concluded that "The constitutionality of the separate but equal provisions of the Hill-Burton Act is not an issue, and a declaration as to its constitutionality is not necessary to the disposition of the case." Appendix p. A-63.

If the mere fact that the petitioners have received the Hill-Burton contributions is sufficient to characterize all of their subsequent operations as "state action"—as the majority below held—all is lost for the petitioners at that point; and the respondents are entitled to the injunctive relief sought as the petitioners conceded. Appendix p. A-40. Conversely, if the operations of the petitioners do not constitute "state action" — as the District Court held and as the two dissenting judges below agreed—the petitioners have the clear right to conduct their private affairs in their own way, and the present action should be dismissed for lack of jurisdiction as the respondents conceded. Appendix p. A-40. But in either event the case is disposed of by the finding with respect to "state action," and a subsequent adjudication with respect to the challenged provisions of the Hill-Burton Act, whether of constitutionality or unconstitutionality, cannot alter the result.

It is quite apparent that if the petitioners are subject to the inhibitions of the Fifth and the Fourteenth Amendments, the provisions of the Hill-Burton Act (and of the Surgeon Gen-

eral's regulations) can neither authorize nor excuse any failure to comply with constitutional mandate. It is equally apparent that if the petitioners are not subject to the constitutional inhibitions, they already have the right of private conduct and the challenged provisions in no way enlarge that pre-existing right. In *Eaton v. Board of Managers of James Walker Memorial Hospital, supra*, the City of Wilmington and the County of New Hanover had contributed funds to the Hospital for many years under State legislation which was subsequently held unconstitutional under the North Carolina Constitution. Thus all of such contributions were unconstitutionally made; but the Court of Appeals nonetheless held that the Hospital "was not an instrumentality of the State but a corporation managed and operated by an independent board free from State control." 261 F. 2d 521, 525.

The result of our present case—like the *Eaton* case—is therefore wholly determined by whether or not the "requisite 'state action'" is found, and the constitutionality or the unconstitutionality of the Hill-Burton provisions cannot affect that result. The majority below would appear to have recognized this when it said "Having found the requisite 'state action,' necessarily we must remand to the District Court with directions to grant the requested injunctive relief." Appendix p. A-20. For this effects a complete disposition of the case before the Court for decision.

The majority then went on to state, however, that adjudication of the constitutionality of the challenged provisions of the Hill-Burton Act "is not advisory merely." Appendix p. A-20. But is not made clear why this is true in a controversy which has already been completely disposed of on other grounds, and where the adjudication with respect to constitutionality cannot affect the result already reached in the case. The decision of the majority of the Court of Appeals is in apparent conflict with the decision of this Court in *Turner v. City of Memphis*, 369

U. S. 350 (1962). The *Turner* case involved a restaurant operated at the Memphis Municipal Airport by Dobbs Houses, Inc., under a lease from the City of Memphis. It was simply another leasing case involving public property – like *Burton v. Wilmington Parking Authority, supra*–and the restaurant conceded in this Court that it was "subject to the strictures of the Fourteenth Amendment under" the *Burton* case. The *Turner* case has a brief per curiam opinion, but this Court held that this concession disposed of the case so that no issue remained to be resolved; and that in view of the concession, it was unnecessary to pass on the constitutionality of a state statute which may have required the restaurant to segregate.

Judicial restraint might also counsel a refusal to pass upon the constitutional issue in the present case where that issue is not so squarely presented as to demand adjudication. "The right to declare a law unconstitutional arises because an act of Congress relied upon by one or the other of such parties in determining their rights is in conflict with the fundamental law." *Muskrat v. United States*, 219 U.S. 346, 361 (1911). But the petitioners have never relied upon the challenged provisions of the Hill-Burton Act as a basis for or to excuse or justify their conduct, and have always simply maintained that they were private corporations and persons and that the constitutional amendments erect no shield against their merely private conduct. *Burton v. Wilmington Parking Authority, supra; Civil Rights Cases*, 109 U.S. 3 (1883). Indeed, the petitioners offered to assume for the purposes of argument in the Court of Appeals that the challenged provisions of the Hill-Burton Act are unconstitutional–in the realization that the petitioner's position will stand or fall solely on the question of "state action."

Thus no one in the instant case has yet briefed or argued, or even uttered a word in defense of, the constitutionality of the challenged provisions of the Hill-Burton Act; and in these cir-

cumstances, those provisions are quite literally going by default. The Attorney General of the United States—who might have been expected to defend constitutionality if this issue were actually involved—has chosen instead to intervene in this action, to insist that the constitutional question is involved here although surely this is dubious, and to mount a vigorous and entirely gratuitous[7] attack on the constitutionality of the Hill-Burton Act as passed by the Congress. The petitioners have not argued that it is illegal—although perhaps it should be[8]—for the Attorney General to intervene and attack the constitutionality of an Act of Congress, but, as the majority below characterized this position, it is in truth unusual enough—and this additional unusual circumstance in this unusual case would again suggest that the Court should abstain from a consideration of this constitutional issue until the issue is so squately presented in a proper case as to require adjudication in order to reach a decision in the case.

"The circumstances bring the present record within those considerations which have led this court in the past 'for its own governance in the cases confessedly within its jurisdic-

---

[7] This action was wholly between private parties, and no claim was asserted against the United States by any of them.

---

[8] In the debate on the intervention statute, 28 U. S. C. 2403, Congressman Michener conceded that this Section does not compel the Attorney General, where he intervenes, to defend the constitutionality of the Act of Congress under challenge. He then said "However, my personal opinion is that when the Congress has exercised its constitutional duty and has enacted a law, under its oath, that it believes to be constitutional, it is almost the duty of the Attorney General of the United States to appear in any such a case when any court of the land suggests that he appear, and present all the arguments that he has at his command to sustain the Congress in the enactment of a law which the Congress believes constitutional." 81 Cong. Rec. 3268, April 7, 1937.

tion' to avoid passing on grave constitutional questions because the questions involving the power of Congress come here not so shaped by the record and by the proceedings below as to bring those powers before this Court as leanly and as sharply as judicial judgment upon an exercise of congressional power requires." *United States v. Congress of Industrial Organizations*, 355 U.S. 106, 126 (1948) (Frankfurter, J., concurring).

3. Even if the question of constitutionality is properly before the Court in this action, however, it can hardly be as clear as the majority below apparently felt (without having heard anyone to the contrary) that the challenged provisions of the Hill-Burton Act (and of the Surgeon General's regulations) are actually unconstitutional under both the Fifth and the Fourteenth Amendments to the United States Constitution.

Whether the Federal government should contribute funds to a segregated private facility is an interesting question, although it would appear to be a question for the Congress rather than the courts;* and perhaps the "powerful countervailing equities" suggested by the majority below should influence the Congressional answer to this question. But whether the Federal government can constitutionally contribute funds to a segregated private facility is an entirely different question, and the answer to this particular question seemed quite clear to no less an authority than the Attorney General of the United States who said in his brief below "In short, it can be conceded that a government—whether State or federal—can give away money or grant property and leave the recipient free to discriminate or not

* "One of the current notions that holds subtle capacity for serious mischief is a view of the judicial function . . . that all deficiencies in our society which have failed of correction by other means should find a cure in the courts." Address of Mr. Justice John M. Harlan at Ceremonies of the American Bar Association, Chicago, Illinois, August 13, 1963.

discriminate, on the basis of race, in the use of the property." The United States Brief below, p. 39.

It is difficult to see that the challenged provisions of the Hill-Burton Act, (and of the regulations) involve anything more than mere gifts of money leaving the recipients of the gifts free to manage their affairs in their own way—wholly within the imprimatur of the Attorney General. The Hill-Burton provisions do require—as a condition of the grant of Federal funds—that the State plan (if the State wishes to participate) shall provide for adequate hospital facilities "without discrimination." They further provide that the Surgeon General "may" by regulation require of any applicant hospital—if such hospital wants a grant of funds—an assurance that there will be no discrimination; and the Act then provides that under certain circumstances, the Surgeon General shall waive this assurance of non-discrimination which he was not required to exact from the applicant to begin with. 42 U.S.C. 291e(f). Obviously the Act does not require discrimination, but simply provides that in the stipulated circumstances the assurances of non-discrimination normally—but not necessarily — exacted as conditions of the grant shall be waived, so that the applicant hospital in these stipulated circumstances may qualify for Hill-Burton funds without agreeing to any limitation of (and quite obviously without receiving any dispensation to enlarge) its otherwise lawful conduct in this area.

The majority below does not state its grounds for holding the waiver provisions of Section 291e(f) unconstitutional, but simply and flatly states that "These federal provisions undertaking to authorize segregation by state-connected institutions are unconstitutional." Appendix p. A-21. The difficulty with this declaration, however, lies in the premises rather than in the conclusion. It may be true that *a* Federal provision undertaking to authorize segregation by a state-connected institution would be unconstitutional—it would in any event be ineffectual. But

under the decision below the only "connection" between these private institutions and the "State" lies in their receipt of the Hill-Burton funds; and even if this is a sufficient connection—as it was for the Court of Appeals—it still does not appear that the Federal provisions which are challenged do undertake "to authorize segregation." The waiver provisions merely permit government, in the words of the Attorney General, to "give away money or grant property and leave the recipient free to discriminate or not discriminate, on the basis of race, in the use of the property." But these provisions clearly do not "undertake" to enlarge the pre-existing rights of the recipient of such a grant, whatever those rights may have been; and if the recipient of the Hill-Burton grant were a county hospital already subject to the Fourteenth Amendment, it could hardly be suggested that these provisions undertake to authorize that public hospital to segregate its facilities.

Thus the only complaint against the waiver provisions is that they do not affirmatively require an otherwise private institution to desegregate, but merely leave its privacy intact. It is difficult to believe—particularly in the light of the concession by the Attorney General—that this is unconstitutional; and surely it is not so clearly unconstitutional that it should be held so on this record in a case where no one has yet said a word in behalf of the Congress of the United States.

Even if the challenged provisions of the Hill-Burton Act are unconstitutional, however, there still remains the question of whether these provisions may be severed from the remainder of the statute where it seems clear that this severance will thwart the legislative intent of the Congress. The waiver provisions have been in the Hill-Burton Act since its original enactment in 1946, and the Congress has more than once expressly refused to restrict grants in aid under the Act to those hospitals which would agree—as conditions of the grant—to desegregate their

facilities.[10] Yet the Court of Appeals by "pruning" the Act has in effect passed this legislation which the Congress would not pass—and has passed it in a way not open to the Congress, for a Congressional amendment would operate prospectively while this legislation by excision operates retroactively to desegregate every private hospital which has accepted Federal grants in aid under the Act. It is not easy to understand how this "serves the dominant congressional purpose best." Appendix p. A-21.

It is true that if the Hill-Burton connection alone is deemed sufficient state-connection to constitute "state action," the result is accomplished without any necessity for "pruning" the provisions of the Act. That again is something clearly not contemplated by the Congress which expressly negatived any Federal control over hospitals aided under the Act. 42 U.S.C. 291m. But even that approach shows more regard for the Congressional enactment than a deliberate reshaping of the statute in a way which has already been considered and declined by the Congress. It would appear that the power to "prune" a statute, perhaps even more than the power to declare it unconstitutional in its entirety, should be exercised with delicacy; and that if the Court is to effect by declaratory judgment that which has failed of legislative revision, this should be done only after a full presentation of and a full deliberation on all relevant considerations.

CONCLUSION

This petition for a writ of certiorari should be granted because review is sought of a final judgment of a Court of Appeals which has declared part of an Act of the Congress of the United

---

[10] Such a proposal was again rejected as recently as last August; see Judge Haynsworth, dissenting below, Appendix p. A-37. And cf. R., Vol. II, p. A-15-16.

States unconstitutional, and which presents grave legal questions of obvious public importance and general interest on which this Court ought to have the last say.

Respectfully submitted,

Charles E. Roth
Greensboro, North Carolina
Counsel for Petitioners The Moses H. Cone Memorial Hospital and Harold Bettis

Thornton H. Brooks
Greensboro, North Carolina
Counsel for Petitioners Wesley Long Community Hospital, Inc., and A. O. Smith

January 20, 1964

Herbert S. Falk
Thomas O. Moore, Jr.
Of Counsel

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8908

G. C. Simkins, Jr., A. W. Blount, Jr., Walter J. Hughes, Norman N. Jones, Girardeau Alexander, Milton H. Barnes, W. L. T. Miller, E. C. Noel, III, F. E. Davis, A. J. Taylor and Donald R. Lyons, Plaintiffs, and United States of America, Intervenor,
Appellants,

vs.

The Moses H. Cone Memorial Hospital, a Corporation, Harold Bettis, Director of The Moses H. Cone Memorial Hospital, and Wesley Long Community Hospital, a Corporation, and A. O. Smith, Administrator of the Wesley Long Community Hospital,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the United States District Court for the Middle District of

North Carolina, at Greensboro, with direction that an order be entered in conformity with the opinion of the Court filed herein; and that the costs on appeals other than of the United States of America be borne by the appellees.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

ALBERT V. BRYAN
United States Circuit Judge.

J. SPENCER BELL
United States Circuit Judge.

We dissent:

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

Filed Nov. 1, 1963 Maurice S. Dean, Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8908.

G. C. Simkins, Jr.,
A. W. Blount, Jr., et al.,
Plaintiffs, and United States
of America, Intervenor,
Appellants,

versus

The Moses H. Cone Memorial
Hospital, a Corporation,
Harold Bettis, Director of
The Moses H. Cone Memorial
Hospital, and Wesley Long
Community Hospital, A Corporation,
and A. O. Smith, Administrator of
the Wesley Long Community Hospital,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. EDWIN M. STANLEY, DISTRICT JUDGE

(Argued April 1, 1963. Decided November 1, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH, BOREMAN, BRYAN and J. SPENCER BELL, Circuit Judges, sitting en banc.

Jack Greenberg (James M. Nabrit, III, Michael Meltsner, and Conrad O. Pearson on brief) for Appellants other than the United States of America; Harold H. Greene, Attorney, Department of Justice, (Burke Marshall, Assistant Attorney General, William H. Murdock, United States Attorney, St. John Barrett and Howard A. Glickstein, Attorneys, Department of Justice, on brief) for United States of America, Intervenor, Appellant; Charles E. Roth (Herbert S. Falk on brief) for The Moses H. Cone Memorial Hospital and Harold Bettis, its Director, Appellees, and Thornton H. Brooks (Thomas O. Moore, Jr., and McLendon, Brim, Holderness & Brooks on brief) for Wesley Long Community Hospital, Inc., and A. O. Smith, Appellees.

SOBELOFF, Chief Judge:

The threshold question in this appeal is whether the activities of the two defendants, Moses H. Cone Memorial Hospital and Wesley Long Community Hospital, of Greensboro, North Carolina, which participated in the Hill-Burton program, are sufficiently imbued with "state action" to bring them within the Fifth and Fourteenth Amendment prohibitions against racial discrimination. Beyond this initial inquiry lies the question of the constitutionality of a portion of the Hill-Burton Act (Hospital Survey and Construction Act), 60 Stat. 1041 (1946), as amended, 42 U.S.C.A. § 291e(f)[1], and a regulation pursuant

[1] 42 U.S.C.A. § 291e(f) provides:

"291e. General regulations. Within six months after August 13, 1946 [the enactment of this title], the Surgeon General, with the approval of the Federal Hospital Council and the Secretary [of Health, Education, and Welfare], shall by general regulation prescribe—

* * *

"(f) That the State plan shall provide for adequate hospital fa-

thereto, 42 C.F.R. § 53.112,[2] 21 Fed. Reg. 9841 (December 12, 1956). Because of the importance of these questions the court, on its own motion, has heard the appeal en banc.

---

cilities for the people residing in a State, without discrimination on account of race, creed, or color, and shall provide for adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint."

---

[2] 42 C.F.R. § 53.112 provides:

"53.112 Nondiscrimination. Before a construction application is recommended by a State agency for approval, the State agency shall obtain assurance from the applicant that the facilities to be built with aid under the Act will be made available without discrimination on account of race, creed, or color, to all persons residing in the area to be served by that facility. However, in any area where separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities, are provided for separate population groups, the State agency may waive the requirement of assurance from the construction applicant if (a) it finds that the plan otherwise makes equitable provision on the basis of need for facilities and services of like quality for each such population group in the area, and (b) such finding is subsequently approved by the Surgeon General. Facilities provided under the Federal Act will be considered as making equitable provision for separate population groups when the facilities to be built for the group less well provided for heretofore are equal to the proportion of such group in the total population of the area, except that the State plan shall not program facilities for a separate population group for construction beyond the level of adequacy for such group."

The plaintiffs are Negro physicians, dentists and patients suing on behalf of themselves and other Negro citizens similarly situated. Their complaint seeks declaratory and injunctive relief against the defendant hospitals and their respective administrators and directors. The basis of their complaint is that the defendants have discriminated, and continue to discriminate, against them because of their race in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The plaintiffs seek an injunction restraining the defendants from continuing to deny Negro physicians and dentists the use of staff facilities on the ground of race; an injunction restraining the defendants from continuing to deny and abridge admission of patients on the basis of race, and refusing on that basis to permit patients to be treated by their own physicians and dentists at the defendant hospitals; and a judgment declaring unconstitutional 42 U.S.C.A. § 291e(f) and 42 C.F.R. § 53.112, which authorize the construction of hospital facilities and the promotion of hospital services with funds of the United States on a "separate-but-equal" basis.

Since this proceeding is one in which "the constitutionality of * * * [an] Act of Congress affecting the public interest * * * [has been] drawn in question, "the United States, pursuant to 28 U.S.C.A. § 2403 and Rule 24(a), Fed. R. Civ. P., moved to intervene. Its motion for intervention was granted and throughout the proceedings the Government, unusually enough, has joined the plaintiffs in this attack on the congressional Act and the regulation made pursuant thereto.

The present appeal is from a final order of the District Court, entered December 17, 1962, granting the defendants' Motion to Dismiss for lack of jurisdiction on the ground that no "state action" was proved and denying the motions by the

plaintiffs and the United States for summary judgment.[3] The plaintiffs and the United States appealed.

As the District Court concluded, there is no material issue of fact. Moreover, extensive and well-supported findings of fact were made by that court.[4] We will not undertake to repeat these findings which are to be deemed incorporated in our opinion by reference. We set forth only such facts as are necessary for the development of the discussion.

FACTUAL BACKGROUND

Six of the plaintiffs are physicians and three are dentists, and all of them are duly licensed and practice their professions in Greensboro. Before filing the complaint they sought staff privileges at the defendant hospitals, which were denied them because of racial exclusionary policies. Two of the plaintiffs are persons in need of medical treatment who desire to enter either of the defendant hospitals which, they contend, possess the most complete medical equipment and the best facilities available in the Greensboro area. They also desire to be treated by their personal physicians who are Negroes. The Long Hospital, however, completely excludes Negro patients and professionals. The Cone Hospital, on the other hand, excludes all but a select few Negro patients, who are admitted on special conditions not applied to whites; and, when the complaint was filed, this hospital did not admit Negro doctors and dentists to staff privileges.[5]

The claims of racial discrimination were, as the District Court found, "clearly established." In fact the hospitals' appli-

[3] *Simkins v. Moses H. Cone Memorial Hospital*, 211 F. Supp. 628 (M.D.N.C. 1962).

[4] *Id.* at 630-34.

[5] On the day following the order dismissing the case, Cone Hospital advised the plaintiffs, and publicly announced, that it would consider staff applications from Negroes. The policy with respect to Negro patients, however, was not changed.

cations for federal grants for construction projects openly stated, as was permitted by statute, 42 U.S.C.A. § 291e(f), and regulation, 42 C.F.R. § 53.112, that "certain persons in the area will be denied admission to the proposed facilities as patients because of race, creed or color." These applications were approved by the North Carolina Medical Care Commission, a state agency, and the Surgeon General of the United States under his statutory authorization.

Both Cone and Long are nonprofit hospitals owned and governed by boards of trustees, and under state law they are duly constituted charitable corporations. The Long Hospital is governed by a self-perpetuating board of twelve trustees. The Cone Hospital, however, is governed by fifteen trustees, five of whom are selected by various state agencies, and one is appointed by a "public agency" as the District Court assumed for the purpose of its decision. Neither hospital's charter contains any explicit or implicit authorization or requirement for the exclusion of Negro professionals or patients.

By far the most significant governmental contact of these two hospitals is their participation in the federally assisted Hill-Burton hospital system. As a result of their involvement in the Hill-Burton hospital construction program both hospitals have received large amounts of public funds, paid by the United States to the State of North Carolina and in turn by North Carolina through its Treasurer, to the hospitals. They received these funds as part of a "state plan" for hospital construction, which allocates available resources for hospitals within the state and contemplates and authorizes the defendants to exclude Negroes.

When this action was commenced, the United States had appropriated $1,269,950.00 to the Cone Hospital and $1,948,800.00 to the Long Hospital. Cone had already received these funds which amounted to about 15% of the total construction expenses involved in its two projects. Long had received most of

the funds appropriated to it (over $1,500,000.00 already paid) which constitute about 50% of the total cost of its three projects.* These appropriations for the most part were after the Supreme Court's landmark decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955).

The Hill-Burton program requires that states wishing to participate must inventory existing facilities to determine hospital construction needs and to develop construction priorities under federal standards. State agencies are designated to perform this function and to adopt state-wide plans to be submitted for the approval of the Surgeon General of the United States. The designated North Carolina agency is the North Carolina Medical Care Commission. The Act provides for grants of federal funds for construction of new or additional facilities for govern-

---

CONE HOSPITAL

Project No. and Year Approved	Purpose	Federal Funds Appropriated 5/8/62	Total Cost of Project	Federal % of Cost
NC-86 (1954)	General Hospital construction	$ 462,000.00	$5,277,023.32	——
NC-330 (1960)	Diagnostic and treatment center; general hospital construction	807,950.00	2,090,000.00	——
Total		$1,269,950.00	$7,367,023.32	17.2%

LONG HOSPITAL

NC-311 (1959)	New hospital construction	$1,617,150.00	$3,314,749.40	——
NC-353 (1961)	Laundry	66,000.00	120,000.00	——
NC-358 (1961)	Hospital-Nurses Training School	265,000.00	492,636.00	——
Total		$1,948,800.00	$3,927,385.40	49.6%

*The court found "approximately" 15% for Cone and "approximately" 50% for Long.

mentally owned hospitals and voluntary nonprofit hospitals.[7]

The allocation of federal funds among the states is determined by a mathematical formula based on population and per capita income. 42 U.S.C.A. § 291g. The "federal share" of costs of particular projects within a state is governed by federally approved state plans. 42 U.S.C.A. § 291e(f). North Carolina's current plan programs general hospital facilities based on a "federal share" of 55%. Through January 31, 1963, a total of 350 Hill-Burton projects was approved by the State of North Carolina. This involved 10,210 inpatient beds and 106 health units. The total cost of these projects was approximately $180,866,000.00 and the "federal share" amounted to approximately $77,854,000.00. Of these projects 325 were already in operation. They included 8496 inpatient beds and 100 health units. The total cost of these facilities was $139,650,000.00 and the "federal share" was $58,621,000.00.[8]

Participation in the Hill-Burton program subjects hospitals to an elaborate and intricate pattern of governmental regulations, both state and federal, of which the following categories are most significant for present purposes:

(1) The Act provides that if within 20 years after completion of a project a hospital is sold to anyone who is not qualified

[7] In the first fifteen years of the program (1947-1961) approximately $1.55 billion of federal funds were approved for such projects. Slightly more than half of the total went to voluntary nonprofit hospital projects. In the same period state and local funds (governmental and nongovernmental) totaled about $3.38 billion; thus, the federal share of Hill-Burton projects was slightly more than 30% of their total cost. See "Hill-Burton Program—Progress Report, July 1, 1947—June 30, 1961," United States Department of Health, Education, and Welfare, Public Health Service Publication No. 880 (1961).

[8] See "Hill-Burton Project Register: Hospital and Medical Facility Projects Approved During January, 1963," United States Department of Health, Education, and Welfare, Public Health Service Division of Hospital and Medical Facilities (1963).

to file an application thereunder or is not approved by the state agency, or if the hospital ceases to be "nonprofit," the United States can recover a proportionate share of its grant to the hospital. 42 U.S.C.A. § 291h(e). The state agency is required to give notice of any such changes of status. 42 C.F.R. § 53.130.

(2) On its face the Act indicates that participating institutions, correlative to their right to receive monetary assistance, are obligated to render hospital services pursuant to specified "minimum standards (to be fixed in the discretion of the State) for the maintenance and operation of hospitals which receive Federal aid **." 42 U.S.C.A. § 291f(a)(7). And no federal grants are to be allocated to any state which does not enact legislation requiring compliance with the minimum standards. 42 U.S.C.A. § 291f(d). Within a year after the passage of the Hill-Burton Act, North Carolina, to meet its requirements, enacted a "Hospital Licensing Act" in 1947, N. C. Gen. Stat. §§ 131-126.1 *et seq.* (1958), authorizing the adoption of detailed regulations governing hospital maintenance and operation. The federal authorities prescribed and North Carolina adopted "Rules and Regulations for Hospital Licensure." These provide in detail for the management of hospitals under general headings such as administration, clinical services, auxiliary services, nursing service, and food service.

(3) The Act provides for federal decision as to the number of general hospital beds and other facilities required to provide "adequate service" in a state, for general methods of distribution in areas of a state, and for the general manner in which a state agency shall determine priorities of projects based on relative need. 42 U.S.C.A. § 291e(a), (b), (c), (d). State allowances in terms of number of beds per thousand population have been fixed by regulation, 42 C.F.R. § 53.11, as have the methods to be used by state agencies in distributing hospitals in a state. 42 C.F.R. §§ 53.12, 53.13. In addition the "separate-but-equal"

provisions stipulate that facilities for separate population groups shall not be programmed for construction "beyond the level of adequacy for such group." 42 C.F.R. § 53.112. And federal standards governing the state agencies' determination of the priority of projects are set out in 42 C.F.R. §§ 53.71 to 53.80. See also 42 C.F.R. § 53.127 (b) and 42 C.F.R. § 53.127 (d) (6).

(4) A state, to participate in the Hill-Burton program, is required to submit for approval by the Surgeon General a state plan setting forth a "hospital construction program" which, among other things, "meets the requirements as to lack of discrimination on account of race, creed, or color, and for furnishing needed hospital services to persons unable to pay therefor, required by the regulations prescribed under section 291e (f). * * *" 42 U.S.C.A. § 291f (a) (4).

Both state plans, 42 U.S.C.A. § 291f (a) (4) (D); 42 C.F.R. § 53.111, and project applications, 42 U.S.C.A. § 291h (a); 42 C.F.R. § 53.127 (d) (4), are subject to this general nondiscrimination requirement. However, the Act, 42 U.S.C.A. § 291e (f), authorizes the Surgeon General to make a regulation to provide an exception to the general racial nondiscrimination rule by making "equitable provision" for separate hospitals for separate population groups. Thus, by statute and regulation the states may meet the nondiscrimination requirement "in any area where separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities and services of like quality for each such population group in the area, and * * * such finding is subsequently approved by the Surgeon General." 42 C.F.R. § 53.112.

Where a "separate-but-equal" plan is in operation, the individual applicant for aid need not give any assurance that it will not discriminate and, in fact, may expressly indicate on its application form, as did each of the defendant hospitals, that "certain persons in this area will be denied admission to the pro-

posed facilities as patients because of race, creed, or color." The arrangement to extend aid is formally concluded by a memorandum of agreement signed by representatives of the applicant, the state agency and the Surgeon General.

Where a state seeks to meet the nondiscrimination requirement by programming separate facilities for different population groups, it is required to submit to the Surgeon General a "Non-Discrimination Report" (Form PHS-8). The preparation of this report requires the state agency specifically to enumerate the number of hospital beds available for each racial group. According to the record, the North Carolina Medical Care Commission submitted such a "Non-Discrimination Report" on January 3, 1962. It lists the L. Richardson Memorial Hospital as having 91 acceptable beds for "non-white" patients and none for "white"; Wesley Long Community Hospital as having none for "non-white" patients and 220 for "white"; and Moses H. Cone Hospital as having none for "non-white" and 482 for "white" patients.

Significant duties are imposed on the Surgeon General with respect to the "Non-Discrimination Report." 42 C.F.R. §53.112 provides that a state agency's findings must be approved by the Surgeon General. Consequently, the Surgeon General has the duty of determining whether the state agency has properly applied the "separate-but-equal" formula, *i.e.*, whether the state's plan actually makes "equitable provision" for all population groups. The "Non-Discrimination Report" submitted by the North Carolina Medical Care Commission on January 3, 1962, was approved by the Surgeon General on January 22, 1962.

The point of present interest is not the equality or lack of equality in "separate-but-equal," but the degree of participation

by the national and state governments in the geographical proration of hospital facilities throughout the state.[9]

THE LEGAL ISSUE

Upon this factual foundation the District Court formulated the question for determination as follows: "[W]hether the defendants have been shown to be so impressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments to the Constitution of the United States." After first examining separately each of the above and other points of governmental contact, the court concluded that none was sufficient to impress the hospitals with the necessary "public interest." Then, considering the various factors together, the court agreed with the defendants that "zero [the quantum of each separate factor] multiplied by any number would still equal zero." Having found no "state action" the court declined to pass upon the constitutionality of 42 U.S.C.A. § 291e(f) and 42 C.F.R. § 53.112 since such a declaratory ruling was no longer necessary to the decision of the case and would therefore constitute a forbidden "advisory opinion."

Although the District Judge earnestly faced and sought to make a reasoned analysis of the problems presented, it is our conclusion that the case was wrongly decided. In the first place we would formulate the initial question differently to avoid the erroneous view that for an otherwise private body to be subject to the antidiscrimination requirements of the Fifth and the Fourteenth Amendments it must actually be "render[ed an] instrumentalit[y] of government * * *." In our view the initial

[9] As an aside, it is to be noted that in "Equal Protection of the Laws in North Carolina," a Report of the North Carolina Advisory Committee to the United States Commission on Civil Rights (1962) (pamphlet), a special study group found that facilities available to non-whites were both inferior to those available to whites and more limited.

question is, rather, whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense. As the Supreme Court recently said in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-22 (1961), a case involving racial discrimination by a privately owned restaurant operating on government property:

> "The *Civil Rights Cases*, 109 U.S. 3 (1883), 'embedded in our constitutional law' the principle 'that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Chief Justice Vinson in *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). It was language in the opinion in the *Civil Rights Cases*, *supra*, that phrased the broad test of state responsibility under the Fourteenth Amendment, predicating its consequence upon 'State action of every kind * * * which denies * * * the equal protection of the laws.' At p. 11. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon 'state participation through any arrangement, management, funds or property.' *Cooper v. Aaron*, 358 U.S. 1, 4 (1958). It is clear, as it always has been since the *Civil Rights Cases*, *supra*, that 'Individual invasion of individual rights is not the subject-matter of the amendment,' at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause *unless to some significant extent the State in any of its manifestations has been found to have become involved in it*. Because the virtue of the right to equal protection of

the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'This Court has never attempted.' [Citation omitted.] *Only by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance.*" (Emphasis added.)

Weighing the circumstances we are of the opinion that this case is controlled by *Burton*, where the Court held that the "activities, obligations and responsibilities of the Parking Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicate that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." 365 U.S. at 724.[10]

Here the most significant contacts compel the conclusion that the necessary "degree of state [in the broad sense, including federal] participation and involvement" is present as a result of the participation by the defendants in the Hill-Burton program.

---

[10] Accord, *Smith v. Holiday Inns of America*,—F. Supp.—(M.D. Tenn. Civ. No. 3409, 1963); see also *Garner v. Louisiana*, 368 U.S. 157, 183 (1961) (Mr. Justice Douglas concurring); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952).

The massive use of public funds[11] and extensive state-federal sharing in the common plan are all relevant factors. We deal here with the appropriation of millions of dollars of public monies pursuant to comprehensive governmental plans.[12] But we emphasize that this is not merely a controversy over a sum of money. Viewed from the plaintiffs' standpoint it is an effort by a group of citizens to escape the consequences of discrimination in a concern touching health and life itself. As the case affects the defendants it raises the question of whether they may escape constitutional responsibilities for the equal treatment of citizens, arising from participation in a joint federal and state program allocating aid to hospital facilities throughout the state.

Not every subvention by the federal or state government automatically involves the beneficiary in "state action," and it is not necessary or appropriate in this case to undertake a precise delineation of the legal rule as it may operate in circumstances not now before the court. Prudence and established judicial practice counsel against such an attempt at needlessly broad adjudication. Our concern is with the Hill-Burton program, and examination of its functioning leads to the conclusion that we have state action here. Just as the Court in the *Parking Authority* case attached major significance to "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service," 365 U.S. at 724,

---

[11] In *Cooper v. Aaron*, 358 U.S. 1 (1958), the Court explained its decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), as follows:

> "That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is *state participation through any arrangement*, management, *funds or property*." 358 U.S. at 4. (Emphasis added.)

[12] Contrast the case at hand with *Eaton v. Board of Managers of James Walker Mem. Hospital*, 261 F. 2d 521 (4th Cir.), *cert. denied*, 359 U.S. 984 (1958), where the local authorities by contract for care of indigents paid the hospital less than 4½% of its budget.

we find it significant here that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health.[13] Such involvement in discriminatory action "it was the design of the Fourteenth Amendment to condemn." 365 U.S. at 724."[14]

Two additional theories presented by the plaintiffs and the Government are worthy of note.

As the Government argued in its brief, the Hill-Burton Act itself and its legislative history reveal "emphasis on the creation of a State-wide system of hospitals for the provision of hospital service to all the people of the State [which] indicates that the Hill-Burton program was not limited to the granting of financial aid to individual *hospitals*. It shows, rather, a congressional design to induce the States, upon joining the program, to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the * * * [institution actually chosen] would otherwise be private: the equal protection guarantee applies."[15]

---

[13] See 42 U.S.C.A. § 291(a), (b), (c) ("Declaration of purpose with respect to construction of hospitals").

[14] Accord, *Peterson v. City of Greenville*, 373 U.S. 244, 247 (1963).

[15] *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Guillory v. Administrators of Tulane Univ. of Louisiana*, 212 F. Supp. 674 (E.D. La. 1962).

Moreover, the Government's argument stresses the fact that the challenged discrimination has been affirmatively sanctioned by both the state and the federal government pursuant to federal law and regulation. 42 U.S.C.A. § 291e(f); 42 C.F.R. § 53.112. It is settled that governmental sanction need not reach the level of compulsion to clothe what is otherwise private discrimination with "state action."[16]

It remains to discuss the case of *Eaton* v. *Board of Managers of James Walker Mem. Hospital*, 261 F.2d 521 (4th Cir.), *cert. denied*, 359 U. S. 984 (1958). Not only the defendants but also the District Court relied on this as a precedent in apparent conflict with the present decision. This court held, upon consideration of certain sums paid by the City of Wilmington and the County of New Hanover, North Carolina, that the defendant hospital was not so impressed with "state action" as to require injunction under the Fourteenth Amendment against its racially discriminatory practices. Initially we note that *Eaton* was decided before the Supreme Court's decision in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). In light of *Burton* doubt is cast upon *Eaton's* continued value as a prece-

---

[16] See *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161 (1914); *cf. Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Peterson* v *City of Greenville*, 373 U.S. 244 (1963); *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 846 (D.C. Cir. 1961) (Bazelon and Edgerton, JJ. dissenting).

See also *Gantt* v. *Clemson Agricultural College*, — F.2d — (4th Cir. 1963), a school segregation case, where the court said: "The distinction drawn between prohibition and discouragement is a novel one in legal literature, and we must hold it unacceptable. Under the Constitution of the United States a state may no more pursue a policy of discouraging and impeding admission to its educational institutions on the ground of race than it may maintain a policy of strictly prohibiting admissions on account of race."

dent.[17] And we hold that the District Court erred in its attempt to distinguish the *Burton* decision. The Supreme Court's language and holding is not to be limited to cases involving lessees of public property. Also significant is the fact that the *Eaton* case did not involve any consideration of the Hill-Burton program, with its massive financial aid and comprehensive plans.[18] Moreover, no argument was presented in *Eaton* as to possible fulfillment by a private body of a "state" function pursuant to an extensive state plan.[19] And finally, the *Eaton* case did not consider what effect overt state and federal approval would have on otherwise purely private discrimination.

Having found the requisite "state action," necessarily we must remand to the District Court with directions to grant the requested injunctive relief.[20] We agree with the plaintiffs and the Government that adjudication of the statute's constitutionality is not advisory merely and that the plaintiffs have standing

---

[17] See *Hampton v. City of Jacksonville*, 304 F.2d 320, 323 (5th Cir. 1962) (*Eaton* questioned in the light of *Burton*). See also n.12, *supra*. True, the opinion of the Fifth Circuit stresses the reverter feature in *Eaton* as the equivalent of the lease in the *Burton* case; but there is also in the present case, as we have seen, a reverter provision in the event of a sale of the hospital to an unqualified owner within 20 years after completion of a project. 42 U.S.C.A. § 291h(e); 42 C.F.R. § 53.130.

[18] It is now advanced as an argument against our conclusion that the Walker Hospital, like the hospitals here, received construction subsidies of federal origin at some stage of its history after the erection of the building at the expense of the initial private donor. The opinion of this court does not deal with this and indeed shows no awareness of it; nor was this argued to the court. Certainly the decision can scarcely be relied on as authority for a proposition not considered.

[19] See, *e.g.*, *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama* 326 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944).

[20] The District Court's opinion states that the defendants conceded that if the hospitals were found to embody the necessary "state action," "the plaintiffs were entitled to the injunctive relief sought."

to challenge the constitutionality of 42 U.S.C.A. § 291e(f) and 42 C.F.R. § 53.112 which promote federally assisted and approved hospital facilities. To make any relief effective it becomes necessary to pass upon the validity of the statute and the regulation, because they contain an affirmative sanction of the unconstitutional practice.

These federal provisions undertaking to authorize segregation by state-connected institutions are unconstitutional[21] The rest of section 291e(f), providing for hospital facilities without discrimination, however, remains in effect. The basic and overriding purpose of the Hill-Burton Act was to permit the states to develop programs of hospital construction that would provide adequate services "to all their people."[22] 42 U.S.C.A. § 291(a). It serves the dominant congressional purpose best to prune from the statutory provision only that language which adopted what is now known to be an unconstitutional means of accomplishing a constitutional end. The general prohibition against discrimination stands; only the exception tolerating "separate-but-equal" fails. Accordingly, we declare invalid only that portion of 42 U.S.C.A. § 291e(f) which reads:

> "* * * but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; * * *."

---

[21] See, *e.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); *cf. Brown v. Board of Education*, 347 U.S. 483 (1954), *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944).

[22] Senator Hill, co-author of the Hill-Burton Act, stated that it was intended to assist the states in preparing "a State-wide program for new construction so that all the people of the State may have adequate health and hospital facilities." Hearings before Senate Committee on Education and Labor on S. 191, 79th Cong., 1st Sess., p.8.

Unconstitutional as well under the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth are the relevant regulations implementing this passage in the statute.

This court does not overlook the hospitals' contention that they accepted government grants without warning that they would thereby subject themselves to restrictions on their racial policies. Indeed they are being required to do what the Government assured them they would not have to do. But in this regard the defendants, owners of publicly assisted facilities, can stand no better than the collective body of Southern voters who approved school bond issues before the *Brown* decision or the private entrepreneur who outfitted his restaurant business in the Wilmington Parking Garage before the *Burton* decision. The voters might not have approved some of the bond issues if they had known that the schools would be compelled to abandon their historic practice of separation of the races, and the restaurateur might have been unwilling to venture his capital in a business on the premises of the Wilmington Parking Authority if he had anticipated the imposition of a requirement for desegregated service. What was said by the Supreme Court in *Burton* in regard to the leases there in question is pertinent here:

> "[W]hen a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were *binding covenants written into the agreement itself.*" (Emphasis added.) 365 U.S. at p. 726.

We accord full weight to the argument of the defendants, but it cannot prevail. Not only does the Constitution stand in the way of the claimed immunity but there are powerful countervailing equities in favor of the plaintiffs. Racial discrimination

by hospitals visits severe consequences upon Negro physicians and their patients.[23]

Giving recognition to its responsibilities for public health, the state elected not to build publicly owned hospitals, which concededly could not have avoided a legal requirement against discrimination. Instead it adopted and the defendants participated in a plan for meeting those responsibilities by permitting its share of Hill-Burton funds to go to existing private institutions. The appropriation of such funds to the Cone and Long Hospitals effectively limits Hill-Burton funds available in the future to create non-segregated facilities in the Greensboro area. In these circumstances, the plaintiffs can have no effective remedy unless the constitutional discrimination complained of is forbidden.[24]

---

[23] *Cf. Sweatt v. Painter*, 339 U.S. 629 (1950).

Racial discrimination in medical facilities is at least partly responsible for the fact that in North Carolina the rate of Negro infant mortality is twice the rate for whites and maternal deaths are five times greater. See "Equal Protection of the Laws Concerning Medical Care in North Carolina," Appendix K (Subcommittee on Medical Care of the North Carolina Advisory Committee to the United States Commission on Civil Rights (mimeographed)).

Exclusion of Negro physicians from practice in hospitals on account of their race denies them opportunities for professional improvement and has discouraged Negro physicians from practicing in the cities of the South. Reitzes, *Negroes and Medicine*, 272, 295, 316 (1958).

---

[24] Raised in a preliminary motion in the District Court, not pressed on appeal, was the question whether, since the complaint challenged the constitutionality of an act of Congress, a three-judge district court was required. See 28 U.S.C.A. § 2282. If there is state action, as we hold, the validity of the statute is no longer debatable, the recent decisions of the Supreme Court having clearly and uniformly decided against such distinctions as the statute permits. When the substantive issue has become so academic, the convening of a three-judge court is not required. See *Bailey v. Patterson*, 369 U.S. 31 (1962).

The order of the District Court is reversed and the case is remanded for the entry of an order in conformity with the opinion of this court.

Reversed and remanded.

HAYNSWORTH, Circuit Judge, with whom BOREMAN, Circuit Judge, joins, dissenting:

Believing the conclusion of the majority both unprecedented and unwarranted, I respectfully dissent.

If it is not made plain in the opinion of the majority, it should be clearly understood that neither of these hospitals came into existence under the promptings of federal or state officials, or because of the lure of large governmental subsidies.

Moses H. Cone Memorial Hospital was first organized in 1911. Mrs. Bertha Cone, the widow of Moses H. Cone, provided large sums of money for the purpose of establishing and constructing a nonprofit hospital in Greensboro, North Carolina. The corporation which she caused to be organized in 1911 has since successfully operated a large hospital in Greensboro providing a wide variety of medical services. It owned and operated facilities having a depreciated cost value of many millions of dollars, and, in addition, it had a substantial endowment. It was not until 1954 that the Cone Hospital, contemplating an addition to cost $5,277,023.32, made application for Hill-Burton funds in the amount of $462,000. In 1960, it filed a second application for Hill-Burton funds in the amount of $807,950 in connection with the construction of a diagnostic and treatment center and a further addition to its general facilities, costing in the aggregate $2,090,000. Both of these applications were approved, with the result that the Cone Hospital has received a total of $1,269,950 in Hill-Burton funds in connection with additions costing $7,367,023.32. As the majority opinion points out, the subsidies Cone received amounted to a little more than

seventeen per cent of the cost of the 1954 and 1960 additions, but the subsidies amounted to a very much smaller proportion of the total cost of all of its facilities.

The facilities of the small 78-bed Wesley Long Hospital in Greensboro were antiquated. In 1959 and 1961, it filed three applications for Hill-Burton funds in aid of reconstruction and expansion projects designed to replace its antiquated facilities with modern ones and to enlarge its capacity to 150 beds. These applications were approved in the aggregate amount of $1,948,100, being approximately fifty per cent of the total cost of the construction programs undertaken in 1959 and 1961. The proportion of subsidy to the total value of all of its facilities does not appear.

It is against this background that we must approach the question of whether or not the present operation of these hospitals is "state action" in a constitutional sense, so that their operation is subject to the requirements of the Fourteenth Amendment.

The plaintiffs contend that state action should be found to have arisen out of the "totality" of the circumstances that a minority of the members of the Board of Trustees of the Cone Hospital are appointed by designated public officials, that Cone voluntarily cooperates with two state supported colleges in a program for the training of student nurses, and, with respect to both hospitals, that they are licensed by the state, as doctors, lawyers and restaurants are, that they enjoy a tax exemption, as every eleemosynary corporation in North Carolina does, and that they received Hill-Burton funds. Since the majority rests its opinion solely upon the receipt of Hill-Burton funds, we may dismiss the other suggested governmental contacts upon which the plaintiffs would rely, being unwilling to rely upon the Hill-Burton contention alone. The United States, as intervenor, readily concedes that the receipt of governmental subsidy alone

would not make the subsequent operation of a hospital state action, but it finds in the Hill-Burton Act and the North Carolina statutes passed in compliance with it such regulation and power of control as to convert the operation of the hospitals into state action in a constitutional sense. This theory, adopted by the majority, distorts the Hill-Burton Act, its purposes and its operation in practice.

The Hill-Burton Act[1] was enacted in 1944 in recognition of the fact that throughout the country construction of hospital facilities had lagged behind the growing needs of our growing population. The country had only recently passed through the long, deep depression of the 1930's and was then still heavily engaged in the second world war. The avowed purposes of the Act were to assist the states in surveying the need for new hospital facilities and developing programs for the construction of needed facilities, and, secondly, to assist in the construction of "public and other nonprofit hospitals" in accordance with the state programs. Memory is not so dim, of course, that it cannot be recalled that, at the time, it was very politic to utilize state agencies wherever possible in the administration of federal programs of grants in aid and of assistance.

That the Congress intended the enactment of no regulatory scheme plainly appears from the provisions of the Act[2] that, "[e]xcept as otherwise specifically provided," nothing in the Act should be construed as giving any federal officer or employee any right of supervision or control over any hospital receiving grants in aid under the Act. The exception encompasses only the powers of the Surgeon General of the United States to approve or disapprove state plans and specific applications for grants in aid. It is thus clear that the Congress intended that

[1] 42 USCA § 291 et seq.

[2] 42 USCA § 291m.

receipt by a private, nonprofit hospital of a grant in aid should not result in a continuing right of control by the Surgeon General or by any other official of the United States. In short, subsequent operation of a hospital which had received a grant in aid of a construction program was not to be federal action.

This is substantiated by the legislative history. In the hearings before the Senate Committee on Education and Labor, Dr. Donald M. Smeltzer, President of the American Hospital Association, made it plain that, once a grant had been paid to a private hospital, the money would belong to the hospital; the grant was a gift.[3] Dr. Parran, Surgeon General of the United States, testified that the purpose was to assist the states "to fill out the missing pieces in the present hospital pattern, and that the hospitals continue to be under local government and voluntary management as they are now."[4]

The donee of such a gift does not become an arm of the donor.

In 1945, North Carolina adopted a statute,[5] as contemplated by the Hill-Burton Act, authorizing the North Carolina Medical Care Commission to survey and determine the need for hospital facilities and what, if any, state assistance was needed by public and private nonprofit hospitals in financing their construction programs. The statute, of course, authorizes the Commission to receive funds from the United States and such funds as might be appropriated by North Carolina, out of which it was authorized to make grants in aid to public and private nonprofit

---

[3] Hearings before the Senate Committee on Education and Labor on S. 191, 79th Cong., 1st Sess. p. 22.

[4] *Ibid.* p. 60.

[5] General Statutes of North Carolina § 131-120.

hospitals for construction projects. The statute goes no further than to authorize the Commission to perform those administrative functions in cooperation with the Surgeon General, as are contemplated by the Hill-Burton Act. There is nothing in it which suggests that the Commission was empowered to exercise regulatory or supervisory functions over the operation of private nonprofit hospitals, whether or not their operators had been the recipients of grants in aid of construction projects. The Attorney General of North Carolina rendered an opinion on February 10, 1962, in which he stated that the Commission had no regulatory or supervisory powers in connection with the operations of these hospitals or of their administrative and professional staffs, and the Executive Secretary of the Commission filed an affidavit in which he disclaimed the existence of any such power. Indeed, the record is barren of any suggestion that the state statute contemplated exercise by the Commission of any such power or that the Commission ever undertook the exercise of any such power.[6]

The Hill-Burton Act and the North Carolina statute complementing it thus provided the machinery by which a hospital, owned and supported by a subdivision of North Carolina or by

---

[6] Under a separate statute, no hospital may be operated in North Carolina without a license from the Commission. § 131-126 et seq. No such license may be obtained or renewed unless the hospital meets certain maintenance and operational standards as prescribed by the Commission. The licensure statute, however, applies to every hospital in North Carolina, whether or not it ever received Hill-Burton funds. It is altogether comparable to statutes which require licenses for the practice of medicine and of law and which prescribe minimal standards of training and of competence. It is comparable to restaurant licensing statutes which prescribe minimal sanitary standards. All of such statutes are designed to protect the public from gross professional incompetence or slovenliness.

It bears repeating, however, that the licensing statute applies to all hospitals, those which have received no Hill-Burton funds as well as to those which have.

a private nonprofit corporation, might apply for a grant in aid of a contemplated construction program. Such an application would be granted only if, based upon the Commission's survey, it was found that there was a need for the contemplated facilities, and those of greater need were to be approved before those of lesser need. There is no suggestion whatever, however, that North Carolina undertook in any other way, as a function of the state, the provision of adequate hospital facilities throughout the state for the benefit of all of its people. The state does provide medical facilities of a specialized nature, as for the care of the insane, but the statutes do not empower the Medical Care Commission to provide general hospital facilities in a locality in default of cooperative efforts by local governmental bodies or citizens for the provision of such facilities. The role of the Commission is strictly limited, as is the role of the United States, to providing grants in aid of local effort, and the Commission is empowered to do nothing in the absence of such local effort. The assertion of the United States that North Carolina had undertaken a duty to provide local hospital services, where none were otherwise provided, is without any support whatever.

In this aspect of the case, the so-called "state plan" is no more than a survey of existing facilities to be utilized as a basis for judgment as to the relative need of such additional facilities as might be proposed by local governmental bodies or private nonprofit corporations or groups. In this scheme of things, these two hospitals played the same role in the same way before they applied for and received grants in aid of construction programs as they did afterwards. The facilities they operated before necessarily were taken into account and were highly relevant to any determination of the need of additional facilities in Greensboro. Afterwards, in exactly the same way, their expanded facilities entered into the survey and were highly relevant to a de-

termination of any need for additional facilities in the area.' Whether the expansion and improvement of these hospitals were accomplished with or without grants in aid, they would have affected the "plan" in precisely the same way. If then, the operation of these hospitals was not state action before their receipt of the grants in aid, a determination that their operation is now state action depends wholly upon the fact that they received the grants in aid. The parties in the controversy are agreed that receipt of the grants, alone, does not permit a conclusion that subsequent operation of the hospitals is state action. Certainly no court has yet held that the private operation of any endeavor becomes state action merely because its construction or operation has been subsidized by Government. But that is all there is in this case.

Here it should be noted that as to North Carolina the first of the stated purposes of the Hill-Burton Act was largely accomplished in 1945, or soon thereafter, when North Carolina enacted a statute within the contemplation of the Act, created its Medical Care Commission, and that Commission made the survey and adopted regulations meeting Hill-Burton's requirements. Indeed, North Carolina had conducted its hospital sur-

---

[1] I find no warrant for the majority's statement that "the defendant hospitals operate as integral parts of comprehensive jo ver or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health." The fact that these hospitals exist and operate must be taken into account in determining what, if any, additional hospital facilities are needed in the Greensboro area. Their "operation" is no part, much less integral, of someone else's plan to assist in providing additional hospital facilities in the areas of greatest need. Neither those of us who are well fed nor those of us who are underfed may be said reasonably to "operate as integral parts" of a governmental plan to make surplus foods available to indigents. A determination of those of us who are indigent is an essential part of the plan, but those whose heads are counted are neither integrally nor otherwise a part of the plan, though those on one side of the dividing line are its beneficiaries.

vey before Hill-Burton's enactment in 1944. When the first of these grants in aid was approved in 1954, approximately nine years after the first of the stated purposes of Hill-Burton had been accomplished, it was clearly in furtherance of the second of its stated purposes, to assist in the construction of "public and other nonprofit hospitals." From this, one cannot reasonably infer that an "other" than public nonprofit hospital, the construction of which was thus assisted, became public because of the assistance.

The majority appears to make much of the fact that, as authorized by the statutes, the Surgeon General and the North Carolina Medical Care Commission require certain minimal construction standards as a condition of the approval of grants in aid, but it does not follow from such requirements that the United States or North Carolina has so reached into the operation of the hospitals as to make that function a governmental one. Inevitably, when Government subsidizes, it requires assurance that its subsidy will be used for the intended purpose. Applications for grants in aid for construction programs which are not needed are not to be approved, nor should they be approved if the proposed facilities will not serve the intended purpose. The minimal construction standards are provided only for the purpose of assuring that the facilities actually constructed with the help of a grant in aid will adequately serve the need which prompted the allowance of the grant. Anything short of that would be a profligate and irresponsible waste of public money; anything more than that cannot be spun out of this record.*

Finally, reference is made to the fact that there is a right to recapture a proportionate part of a grant in aid in the event that the constructed facilities are abandoned for hospital purposes

* Minimal operational and maintenance standards are prescribed as a condition of licensing, but the licensing statutes apply to all hospitals without regard to the receipt of Hill Burton funds. See fn. 6, supra

or transferred to an unqualified operator within twenty years. That provision, however, creates no interest in the facilities. It is not comparable to a right of reverter retained by a public body. It simply creates a limited and declining personal right of action against the recipient of the grant in aid if it deserts the purpose it represented it had when it obtained the grant. Again, this is no more than a necessary provision for the protection of public moneys against unreasonable profligacy.

Any system of governmental subsidization necessarily carries with it the terms or conditions which must be met if the subsidy is to be obtained by a particular applicant. The tobacco farmer cannot obtain price supports if he does not comply with the quota requirements. A farmer cannot obtain a soil bank payment if he devotes his land to an unallowable use. A private, nonprofit college cannot obtain from the Small Business Administration a grant in aid of research unless it agrees to devote the money to a research project calculated to be of assistance to small businesses and which merits the approval of the Small Business Administration. The imposition of such conditions upon the receipt of subsidies is not, in a legal sense, the exercise of such control or the assumption of such authority as to make the subsequent operations of the recipient state action in a constitutional sense. The tobacco farmer harvesting his in-quota tobacco or another farmer planting trees on his soil bank land is performing no function of state or nation, though his work, as all legitimate, productive work, contributes to the economic health of the nation.

Here, it is apparent that a private operator of a nonprofit hospital must meet the conditions upon which grants in aid are made available if it wants to obtain the grant, but, having done so, its subsequent operation is not made thereby a governmental function. We may extract from the statutes such words as "plans," "surveys" and "programs," but magnification of the

extracted words cannot convert the conditions of the grant in aid program into an authoritative, regulatory program which the Congress specifically proscribed and which the State of North Carolina disavows. The truth is plain. This scheme for grants in aid to hospitals differs neither in kind nor degree from any other provision for grants in aid of private endeavor.

The question should be regarded as foreclosed in this Circuit by our decision in Eaton v. Board of Managers of The James Walker Memorial Hospital, 261 F.2d 521. There, it appeared the municipality conveyed the original site to the hospital, reserving to itself a right of reverter in the event the land ceased to be used for hospital purposes. Public officials selected the original board of trustees, but the original facilities were constructed with the private funds of Mr. Walker. That occurred shortly after the turn of the century. Much later, other land was acquired in fee and additional facilities were built. The complaint, as the records of this court disclose, alleged that the hospital "received large grants of money from the Federal Government" for its expansion project, an allegation which was admitted by the motion upon which the case was decided. In addition, it appeared that the city and county made annual payments to current operating revenues under contracts providing for the care of indigent patients. During the six years, 1952 through 1957, these annual contributions to operating revenues amounted to more than $277,000. These contributions to operating funds, as the majority points out, amounted, on the average, to approximately four per cent of the operating budget, but they were far from inconsequential, and the fact is that the hospital had also received construction subsidies of federal origin, just as had the hospitals here.

It is true that, in holding that the Walker Memorial Hospital "was not an instrumentality of the State but a corporation managed and operated by an independent board free from State

control," our attention was concentrated upon the annual contributions to operating funds rather than upon the contributions to capital funds, but the case is quite indistinguishable in its facts. Indeed, the cases here are stronger for the defense, for these hospitals are not shown to have been the recipients of any contributions toward operating revenues, and the land of neither is subject to any right of reverter in favor of any governmental body.

I find no reason for thinking that our decision in Eaton was overruled or weakened, as applied to the facts here, by the decision of the United States Supreme Court in Burton v. Wilmington Parking Authority, 365 U.S. 715. There, Wilmington Parking Authority, an agency of the State of Delaware, constructed a parking facility, of which a restaurant was an integral part. It leased the restaurant area to a restaurant operator. Under the lease, the Authority supplied to the restaurant heat and fuel, and the Authority maintained exterior surfaces and had the right to place directional signs upon them. Fixtures placed in the leased area by the lessee became the property of the Authority and were not subject to taxation. The entire building, however, and this is the point of Burton, was a public building owned by a public authority and serving a public purpose. It was conceived and constructed as an entity, the restaurant being a necessary or an appropriate adjunct to the other services offered in the building. That the Authority chose to operate the restaurant through a lessee did not destroy the public character of the restaurant which it inevitably acquired from the building. Concessionaires and lessees in governmental buildings such as capitols and courthouses take on the character of the buildings and of the primary functions they serve. They necessarily are understood to be serving a public purpose and discharging a public function.

Here, in contrast, these hospitals are not publicly owned.

They serve no public purposes, except that their operation contributes to public health, just as it did before their receipt of Hill-Burton funds. The state has an interest in public health, but identity of interest does not convert a private organization into a public body. That a private organization's operations are compatible with governmental purposes is a cause of satisfaction, but, when a private organization operates on its own premises, in its own way, free of governmental supervision and control, its operations cannot be said to be state action."

The suggestion of the majority that the Court of Appeals for the Fifth Circuit in Hampton v. City of Jacksonville, 5 Cir., 304 F.2d 320, questioned our decision in Eaton in the light of the Supreme Court's decision in Burton v. Wilmington Parking Authority is wholly unwarranted in this context. Chief Judge Tuttle, in his opinion, thought that, in the circumstances of the transfer of the golf course by the City, reservation of the right of reverter was comparable to a lease arrangement such as that involved in Burton v. Wilmington Parking Authority. Thinking so, he suggested that Eaton might have been otherwise decided had it come before us after Burton, but only because of the presence in Eaton of the right of reverter in favor of the municipality. There is present here no right of reverter in favor of any governmental authority, and the question posed by Chief Judge Tuttle in Hampton is wholly inapposite here. There is nothing in his opinion even obliquely critical of Eaton in the context with which we are now concerned.

---

[9] Of course, when public facilities are nominally transferred to private interests in order to escape constitutional commands and with the intention that the facilities will continue to be devoted to public use as in the past, they are not private. Hall v. St. Helena Parish School Board, E.D. La., (Three Judge Court) 197 F. Supp. 649; Hampton v. City of Jacksonville 5, Cir., 304 F. 2d 320; and see Griffin v. Board of Supervisors of Prince Edward County, 4 Cir., — F. 2d —; cf. City of Greensboro v. Simkins, 4 Cir., 246 F. 2d 425.

Interestingly, Judge Jones concurred in Hampton upon a very limited ground having no bearing upon the authority of Eaton in any context, while Judge Gewin dissented. Judge Gewin found Eaton persuasive after Burton v. Wilmington Parking Authority even in the specific context of the reserved right of reverter in favor of the municipality.

The specific question with which we deal, the effect of the receipt of Hill-Burton funds upon the operation of an otherwise private, nonprofit hospital, has been considered by other courts. They have been unanimous in their conclusion that the operation of such hospitals is not state action so as to make applicable to them the provisions of the Fourteenth Amendment. The Supreme Court of Appeals of Virginia considered the question in Khoury v. Community Memorial Hospital, Incorporated, 203 Va. 236, 123 S.E. 2d 533. Judge Michie, of the Western District of Virginia, dealt with it in Wood v. Hogan, 215 F. Supp. 53. Finally, Eaton, who brought the earlier case against the Board of Managers of Walker Memorial Hospital before us, filed a new action against the Board of Managers of that hospital, seeking a readjudication based upon an attempt to more particularize the facts and upon a contention that the decision of the Supreme Court in Burton v. Wilmington Parking Authority changed the legal climate. Judge Butler held against the plaintiff and dismissed the complaint. Eaton v. Grubbs, E.D.N.C., 216 F. Supp. 465.[10]

Recent measures in the Congress may bear upon governmental understanding of what was undertaken by the Hill-Burton Act and the state statutes enacted in order to qualify hospitals within the states for the grants in aid. On August 7, 1963, the Senate rejected a proposal that henceforth grants in

---

[10] See also such cases as Norris v. Mayor and City Council of Baltimore, D. Md., 78 F. Supp. 451, and Mitchell v. Boys Club of Metropolitan Police, D.C., D.D.C., 157 F. Supp. 101.

aid to hospitals under the Hill-Burton Act be restricted to hospitals which are desegregated and which practice no discrimination on account of race.[11] Other broader proposals for the elimination of racial discrimination in broad categories of institutions and businesses, to be applied prospectively, are now pending before the Congress. These proposals lend some emphasis to what is so clearly apparent from the original Hill-Burton Act that the Congress had no idea that grants in aid authorized through cooperative state agencies would convert the subsequent operation of recipient private hospitals into state action so as to bring them under the Fourteenth Amendment. The Congress may properly reconsider this matter, and, undoubtedly, it has the power, if it chooses to exercise it, to condition future grants of Hill-Burton funds to the execution of nondiscrimination agreements. Under these circumstances, it seems to me particularly inappropriate for us to now hold that the Congress, unbeknownst to itself, in 1944 had done what it now has under consideration for prospective operation only.

For the foregoing reasons, I would affirm the judgment.

---

[11] Vol. 10 Southern School News No. 3, p. 5.

IN THE

THE UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-57-G-62

G. C. SIMKINS, JR., et al;
Plaintiffs,

v.

THE MOSES H. CONE MEMORIAL HOSPITAL,
a Corporation,
HAROLD BETTIS, Director of
THE MOSES H. CONE MEMORIAL HOSPITAL,

and

WESLEY LONG COMMUNITY HOSPITAL,
a Corporation, and

A. O. SMITH, Administrator of the
WESLEY LONG COMMUNITY HOSPITAL,
Defendants,

UNITED STATES OF AMERICA,
Intervenor.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

STANLEY, CHIEF JUDGE:

Plaintiffs, Negro citizens, suing on behalf of themselves and other Negro physicians, dentists and patients similarly situated, seek injunctive and declaratory relief, alleging that the defendants have discriminated against them because of their race, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The relief sought is an injunction restraining the defendants from continuing to deny the admission of physicians and dentists to hospital staff privileges, and the admission of patients to hospital facilities, on the basis of race. Plaintiffs also seek a declaratory judgment that Section 291 e (f) of Title 42, United States Code, and Regulation 53.112 of the Public Health Service Regulations, issued pursuant thereto, are unconstitutional and void as violative of the Fifth and Fourteenth Amendments to the United States Constitution for the reason that said provisions provide for the construction of hospital facilities and the promotion of hospital services, on a racially segregated basis. Since the constitutionality of an Act of Congress affecting the public interest had been drawn into the question, the United States, pursuant to USC § 2403 and Rule 24 (a) of the Federal Rules of Civil Procedure, moved to file a pleading in intervention.

The complaint was filed on February 12, 1962. On April 2, 1962, the defendants moved to dismiss the action for lack of jurisdiction of the subject matter for the reason that the plaintiffs were seeking redress for the alleged invasion of their civil rights by private corporations and individuals. On May 4, 1962, the plaintiffs moved for summary judgment and a preliminary injunction. On May 8, 1962, the United States moved to intervene. On June 26, 1962, the Court held a full hearing on all

pending motions, at the conclusion of which an order was entered granting the motion of the United States to intervene. On July 12, 1962, an order was entered denying plaintiffs' motion for a preliminary injunction, the Court being of the opinion that the injunction was not required pending the final determination of the action on the plaintiffs' motion for summary judgment and the defendants' motion to dismiss.

At the hearing conducted on pending motions, the parties conceded that there was no dispute as to any material fact, and the defendants conceded that if, on the basis of the pleadings, exhibits, affidavits and admissions filed, it should be determined that the defendant hospitals were instrumentalities of the State, the plaintiffs were entitled to the injunctive relief sought. On the other hand, the plaintiffs conceded that if the defendant hospitals were not shown to be instrumentalities of the State, the Court lacked jurisdiction and the action should be dismissed.

At the conclusion of the hearing conducted on June 26, 1962, the Court gave the parties a specified time within which to file proposed findings of fact, conclusions of law, and briefs. The requests of the parties for findings of fact, conclusions of law, and briefs having been received, the Court, after considering the pleadings and evidence, including exhibits, affidavits and admissions filed, and briefs and oral arguments of the parties, and finding no dispute as to any material fact, now makes and files herein its Findings of Fact and Conclusions of Law, separately stated:

FINDINGS OF FACT

1. The plaintiffs, A. V. Blount, Jr., Walter J. Hughes, Norman N. Jones, Girardeau Alexander, E. C. Noell, III, and F. E. Davis, are medical doctors licensed to practice and practicing medicine in the City of Greensboro, North Carolina. The plaintiffs, George C. Simkins, Jr., Milton Barnes and W. L. T. Miller,

are dentists licensed to practice and practicing dentistry in the City of Greensboro, North Carolina. These plaintiffs, all citizens and residents of the United States and the State of North Carolina, residing in the City of Greensboro, North Carolina, seek admission to staff facilities at The Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital without discrimination on the basis of race.

2. The plaintiffs, A. J. Taylor and Donald R. Lyons, are citizens and residents of the City of Greensboro, North Carolina, and are patients of some of the physicians and dentists referred to in the preceding paragraph. These plaintiffs desire admission to the defendant hospitals for the treatment of their illness, and to be treated by their present physician or dentist, without discrimination on the basis of race.

3. The defendants, The Moses H. Cone Memorial Hospital (hereinafter sometimes referred to as "Cone Hospital"), and Wesley Long Community Hospital (hereinafter sometimes referred to as "Wesley Long Hospital"), are North Carolina corporations, and each has established, owns, and maintains a general hospital in the City of Greensboro, North Carolina. Both hospitals are non-profit, tax-exempt and State licensed. The defendant, Harold Bettis, is the Director of Cone Hospital, and the defendant, A. O. Smith, is the Administrator of Wesley Long Hospital. Prior to the institution of this action, the plaintiff physicians and dentists were denied staff appointments to Cone Hospital, and were denied forms for use in making applications for admission to the staff of Wesley Long Hospital. As a matter of policy, neither hospital grants staff privileges to Negro physicians or dentists.

4. Negro patients are admitted to Cone Hospital on a limited basis, and on terms and conditions different from the admission of white patients. Wesley Long Hospital denies admission to all Negro patients. By the policy of excluding Negro

physicians and dentists, Negro patients admitted to Cone Hospital are denied the privilege of being treated by their own physicians and dentists.

5. Cone Hospital was originally incorporated as a private corporation under the general corporation laws of the State of North Carolina, under the name of The Moses H. Cone Memorial Hospital, Incorporated, pursuant to Articles of Incorporation which were filed in the office of the Secretary of State of the State of North Carolina on May 29, 1911. There were ten original incorporators, all of whom were private citizens, and four of whom were members of the Cone family, and these ten incorporators were named as the first Board of Trustees of the corporation. The original Articles of Incorporation stated the intention of applying for a legislative charter in order that the corporation might be permitted to drop the word "Incorporated" from its name, and to provide for a Board of Trustees "with perpetual succession." The legislative charter of the corporation was enacted as Chapter 400 of the Private Laws of North Carolina, Session of 1913. This Private Act "fully ratified, approved, and confirmed" the original Articles of Incorporation, and provided that, in carrying out its corporate purposes, the corporation should continue to "have and enjoy all the powers and privileges conferred by the general corporation law of this State upon corporations of like character," but that it should not become effective as the act of incorporation unless and until it was accepted as such by the original incorporators of the corporation. The charter provided for a Board of Trustees of fifteen members, three to be appointed by the Governor of North Carolina, one by the City Council of the City of Greensboro, one by the Board of Commissioners of the County of Guilford, one by the Guilford County Medical Society, one by the Board of Commissioners of the County of Watauga, and that Mrs. Bertha L. Cone, who was the founder and the principal

benefactor of the corporation, should have the power to appoint the remaining eight members so long as she might live. It was further provided that, after the death of Mrs. Bertha L. Cone, or earlier if she should renounce her right to appoint, the eight trustees originally appointed by her should perpetuate themselves by the election of the Board of Trustees. Mrs. Bertha L. Cone died in 1947, and the charter of the corporation was amended in 1961 to eliminate the appointment of one trustee by the Board of Commissioners of the County of Watauga. The charter now provides, and has provided at all times pertinent to this action, that the eight trustees originally appointed by Mrs. Bertha L. Cone, and the one trustee originally appointed by the Board of Commissioners of the County of Watauga, or a total of nine members of the fifteen-member Board, are to be perpetuated through the election of the Board of Trustees. The trustees appointed by public officials or agencies have always been a minority of the trustees of the corporation.

6. The Cone Hospital owns, and has owned since 1911, the fee simple title to the real property on which its hospital is located. Its Board of Trustees has the exclusive power and control over all real and personal property of the corporation, and all the institutional services and activities of the hospital.

7. The Wesley Long Hospital is a "non-profit and charitable corporation" with no capital stock. The corporation was formed many years ago under the laws of the State of North Carolina to conduct, without profit and for charitable and humane purposes, a general hospital in the City of Greensboro, North Carolina. The title to all of its property, both real and personal, is vested in the corporation. The charter of the corporation makes the Board of Trustees, consisting of twelve members, and all citizens of the City of Greensboro, a self-perpetuating body. The Board of Trustees has the exclusive power and control over

all real and personal property of the corporation, and all the institutional services and activities of the hospital.

8. Both Cone Hospital and Wesley Long Hospital are exempt from ad valorem taxes assessed by the City of Greensboro and the County of Guilford, North Carolina. For the fiscal year 1961-1962, the City tax rate was $1.27 per $100.00 valuation, and the County tax rate was $0.82 per $100.00 valuation.

9. Both defendant hospitals are licensed by the State of North Carolina, and have complied with the licensing procedures and standards set out by the North Carolina Hospital Licensing Act[1] and the rules and regulations of the North Carolina Medical Care Commission.[2] These statutes require every hospital in the State of North Carolina, public or private, profit or non-profit, to be licensed to operate by the Medical Care Commission.

10. Both defendant hospitals are parts of a joint United States-North Carolina program of providing grants of United States funds under the Hill-Burton Act,[3] and both have received funds under the Act in aid of their construction and expansion programs. The North Carolina State Plan, as approved by the Surgeon General of the United States under the Hill-Burton Act, has programmed separate hospital facilities for separate population groups in the Greensboro area, and the Hill-Burton funds for the two defendant hospitals were allocated and granted to, and were accepted by, said hospitals with the express written understanding that admission of patients to the proposed facilities might be denied because of race, creed or color.

---

[1]Sections 131-126.1 through 131-126.17, General Statutes of North Carolina.

[2]Sections 131-117 through 131-126, General Statutes of North Carolina.

[3]42 USC §291, et seq.

11. Project Application NC-86 of the Cone Hospital reveals that for general hospital construction totaling $5,277,023.32, the Federal Government contributed $462,000.00. On February 4, 1954, Cone Hospital approved an agreement for this project. On April 12, 1954, the North Carolina Medical Care Commission approved the agreement. On April 15, 1954, the Surgeon General of the United States, acting through the Regional Medical Director of the Public Health Service, approved the agreement. This application states that Cone Hospital had given adequate assurance that the facility would be operated without discrimination because of race, creed or color. However, in a subsequent project application (NC-330), it is revealed that Cone Hospital had erroneously represented that the facilities of the hospital would be operated without discrimination. After an exchange of correspondence, Project Applications NC-86 and NC-330 were amended, with the approval of the North Carolina Medical Care Commission and the Surgeon General, to permit a waiver of the non-discrimination assurance.

12. Project Application NC-330 granted Cone Hospital $807,950.00 for the construction of a diagnostic and treatment center and a general hospital addition. The total cost of these facilities was $2,090,000.00. The contract under which the funds were allocated was approved by Cone Hospital on March 14, 1960 by the North Carolina Medical Care Commission on March 14, 1960, and by the Surgeon General on March 17, 1960. It was represented in the approved application that "the requirement of non-discrimination has been met because this is an area where separate hospital facilities are provided for separate population groups . . ."

13. Project Application NC-311 granted $1,617,150.00 in federal funds to Wesley Long Hospital for new hospital construction. The total estimated construction funds required were $3,314,749.40. The original agreement under which these funds

were allocated was approved by Wesley Long Hospital on June 23, 1959, by the North Carolina Medical Care Commission on June 24, 1959, and by the Surgeon General on June 30, 1959.

14. Project Application NC-353 granted $66,000.00 to Wesley Long Hospital for the construction of a laundry. The total estimated funds required to complete the project were $120,000.00. The original agreement under which these funds were allocated was approved by Wesley Long Hospital on April 27, 1961, by the North Carolina Medical Care Commission on April 28, 1961, and by the Surgeon General on May 15, 1961.

15. Project Application NC-358 granted $265,650.00 to Wesley Long Hospital for the construction of a hospital Nurses Training School. The total estimated funds to complete the project were $492,636.00. The contract under which these funds were allocated was approved by Wesley Long Hospital on December 7, 1961, by the North Carolina Medical Care Commission on December 8, 1961, and by the Surgeon General on December 15, 1961.

16. The aforementioned project applications of Wesley Long Hospital contained a certification that "the requirement of non-discrimination has been met because this is an area where separate facilities are provided for separate population groups and the State Plan makes otherwise equitable provision, on the basis of need, for facilities and services of like quality for each such population group in the area."

17. As of the date of the filing of this action, the United States had appropriated $1,269,950.00 for Cone Hospital, and the sum of $1,948,800.00 for Wesley Long Hospital. The entire appropriation of $1,269,950.00 had been paid to Cone Hospital, and $1,596,301.60 had been paid to the Wesley Long Hospital, through the Treasurer of the State of North Carolina, as of May 8, 1962. The funds appropriated to Cone Hospital amounted

to approximately 15% of its total construction expense, and the funds appropriated to the Wesley Long Hospital amounted to approximately 50% of its total construction expenses.

18. Plans and specifications submitted by the defendant hospitals for each project were required to conform to Subpart M of the Public Health Service Regulations, which sets forth detailed standards for hospital construction and equipment. These standards constitute minimum requirements for construction and equipment considered necessary to insure properly planned and well constructed facilities which can be maintained and efficiently operated to furnish adequate service.

19. The Agricultural and Technical College of North Carolina, since 1954, and The Woman's College of the University of North Carolina, since 1957, both tax-supported State institutions of higher education, have been permitted to use the facilities of the Cone Hospital to provide clinical experience for their nursing students. The nursing students carry out assignments at the hospital under the supervision and direction of their own teachers, and not of the hospital staff. The hospital subsidizes the meals and laundry service of the students, and provides conference and instructional rooms for their use without charge. Cone Hospital has incurred direct costs of $3,337.59 in connection with the Agricultural and Technical College program since 1954, and has paid these costs from its own funds. The hospital has made direct contributions of $131,835.13 from its own funds to the nursing program of Woman's College since 1957, and has made a commitment of an additional $25,000.00. The hospital has also provided scholarship loans in the additional amount of $10,500.00 for student nurses at Woman's College, which scholarship loans are administered entirely by the college, and not by the hospital, and are available only to nursing students selected by the college. The student nurses do not replace any personnel on the service staff of Cone Hospital, and the

hospital has never been relieved of any of its personnel requirements through the use of student nurses. The principal benefit to Cone Hospital from the operation of the student programs is the intangible benefit to be derived from the creation of sources of well-trained nurses. The hospital, however, has no priority to employ any nurses graduating from either college, and must compete for the services of these graduates with other interested hospitals and employers. The monetary value of the services rendered the hospital by the student nurses is not commensurate with the substantial contributions the hospital has made of both its funds and facilities to the furtherance of the nursing educational programs.

DISCUSSION

It has been clearly established that both defendant hospitals are pursuing racially discriminatory practices by barring Negro physicians and dentists from admission to their staff privileges, and by barring Negro patients from admission to their treatment facilities on the same terms and conditions as white patients. The defendants do not contend otherwise, and their defense has been confined to a showing that neither hospital is a governmental instrumentality, and that any discriminatory practices constitute private conduct which is not inhibited by the Constitution of the United States. This is the basis of the motion of the defendants to dismiss for lack of jurisdiction.

Since the *Civil Rights Cases*, 109 U. S. 3, 27 L. Ed. 835, 3 S. Ct. 18 (1883), it has been firmly established that the inhibitions of the Fifth and Fourteenth Amendments to the Constitution relate solely to governmental action, state or federal, and that neither amendment applies to acts by private persons or corporations. In *Shelly v. Kraemer*, 334 U. S. 1, 13, 92 L. Ed. 1161, 68 S. Ct. 836 (1948), the Supreme Court stated:

> "Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

To the same effect is *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961), where it is stated:

> "It is clear, as it always has been since the *Civil Rights Cases*, supra, that 'Indivdual invasion of individual rights is not the subject-matter of the amendment,' at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."

In light of the foregoing, the sole question for determination is whether the defendants have been shown to be so impressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments to the Constitution of the United States. In making this determination, it is necessary to examine the various aspects of governmental involvement which the plaintiffs contend add up to make the defendant hospitals public corporations in the constitutional sense.

SELECTION OF TRUSTEES

The Board of Trustees of Wesley Long Hospital, consisting of twelve residents of the City of Greensboro, is a self-perpetuating body. It has the exclusive power and control over all real

estate and personal property of the corporation, and all institutional service and activities of the hospital. No public authority has ever had any control whatever over the selection of the trustees, or any right to regulate, control or direct the business of the corporation. Consequently, the manner of selection of the Board of Trustees of Wesley Long Hospital is not a factor in determining whether the corporation is public in character.

A different situation exists with reference to Cone Hospital. Assuming that the Guilford County Medical Society, an agency authorized to appoint one member of the Board of Trustees, is a public agency, nine members of the fifteen-member Board, none of whom are appointed by a public agency, are to be perpetuated through the election of the Board of Trustees. Thus, the members of the Board appointed by public officers or agencies are in a clear minority, and the private trustees are decisively and authoritatively in control of the corporation. "The legal test between a private and public corporation is whether the corporation is subject to control by public authority, state or municipal. To make a corporation public, its managers, trustees, or directors must be not only appointed by public authority but subject to its control." *Norris v. Mayor and City Council of Baltimore*, 78 F. Supp. 451, 458 (Dis. of Maryland, 1948).

The rule enunciated in the *Norris* case seems to have been an established legal principle since 1819. In that year, Mr. Justice Story, in *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 671, 4 L. Ed. 629 (1819), stated:

> "When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of its bounty, but that the government have the *sole right, as trustees of the public interest, to regulate, control and direct the corporation*

and its funds and its franchises, at its own good will and pleasure." (Emphasis supplied).

The plaintiffs principally rely upon *Commonwealth of Pennsylvania v. Board of Directors of City Trust of City of Philadelphia*, 353 U. S. 230, 77 S. Ct. 806, 1 L. Ed. 2d 792 (1957), to support their contention that the appointment of a minority of the members of the Board of Trustees of Cone Hospital by public officers and agencies materially affects the private charater of the corporation. Such reliance is not well taken. In that case, the entire trust was administered by the Board of Directors of City Trusts of Philadelphia, a body created by an act of the Pennsylvania Legislature. No case has been cited or found which holds that the appointment of a minority of trustees by public officers or agencies converts the character of the corporation from private to public.

The entire record makes it quite clear that the Cone Hospital, originally chartered as a private corporation, is subject to no control by any public authority, and that the appointment of the minority members of its trustees by public officers and agencies has in no way changed the private character of its business.

EXEMPTION FROM AD VALOREM TAX ASSESSMENTS

Both defendant hospitals are exempt from ad valorem taxes assessed by the City of Greensboro and the County of Guilford, North Carolina. The same is true with respect to the real and personal property owned by other private religious, educational and charitable organizations.[1] Surely it cannot be said that a purely local church, school or hospital becomes an instrumental-

[1]Sections 105-296 and 105-297, General Statutes of North Carolina.

ity of the state, and subject to its control, by simply having its property exempt from ad valorem taxes. No authority has been cited for such a proposition. Indeed, the plaintiffs in their brief do not contend that ad valorem tax exemptions "in and of itself makes these hospitals agencies of the state and the United States government," but simply argue that all financial contributions from public funds, whether direct or indirect, must be considered in determining whether the defendant hospitals are agencies of the Government. While the subject was not discussed in *Eaton v. Bd. of Managers of James Walker Memorial Hospital*, 4 Cir., 261 F. 2d 521, affirming 164 F. Supp. 191 (E.D. N. C., 1958), cert. den., 359 U. S. 984, 3 L. Ed. 2d 934, 79 S. Ct. 941 (1958), the real and personal property of the James Walker Memorial Hospital was exempt, by state statute, from county and muncipal ad valorem tax assessments

It is concluded that the exemption of the defendant hospitals from ad valorem taxes is not a factor to be considered in determining whether the hospitals are public agencies.

DEFENDANT HOSPITALS AS LICENSEES OF STATE OF NORTH CAROLINA

Since July 1, 1947, every hospital in the State of North Carolina, both public and private, has been required to secure a license from the State through the North Carolina Medical Care Commission.[2] Both defendant hospitals are licensed by the State, and have complied with the licensing procedures and standards prescribed by the North Carolina Medical Care Commission. The stated purpose for requiring hospitals to be licensed "is to provide for the development, establishment and enforcement of basic standards (1) for the care and treatment of individuals in hospitals and (2) for the construction, main-

---

[2]Section 131-126.3, General Statutes of North Carolina.

tenance and operation of such hospitals, which operation will insure safe and adequate treatment of . . . individuals in hospitals . . . ."[3] A license is subject to suspension or revocation under certain conditions.[4] The North Carolina Medical Care Commission is permitted to make such inspection of hospital facilities as it deems necessary.[5] Under the rules and regulations of the North Carolina Medical Care Commission, all professional and non-professional personnel of hospitals must be given pre-employment physical examinations. Provision is made for the organization and qualification of medical staffs of hospitals, and certain facilities are required for operating rooms, delivery rooms, rooms occupied by maternity patients, and rooms occupied by children. There are certain requirements with respect to medical records and reports, the presence of professional registered nurses at all times, and the maintenance of sanitary kitchens. The Commission also reserves the right, in case any public funds will be used in construction of a hospital facility, to approve the plans in advance of construction.

As in the case of licenses issued to restaurants, the hospital licensing statutes and regulations are designed to protect the health of persons served by the facility, and do not authorize any public officials to exert any control whatever over management of the business of the hospital, or to dictate what persons shall be served by the facility.

In *Williams v. Howard Johnson's Restaurant*, 4 Cir., 268 F. 2d 845 (1959), it was argued that if a state licensed a restaurant to serve the general public, such restaurant thereby became "burdened with the positive duty to prohibit unjust discrimina-

---

[3]Section 131-126.2, General Statutes of North Carolina.

[4]Section 131-126.6, General Statutes of North Carolina.

[5]Section 131-126.9, General Statutes of North Carolina.

tion in the use and enjoyment of the facilities." (268 F. 2d 845, 847). In rejecting this argument, the Court stated:

> "This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint . . . . The statute [restaurant licensing law] is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment."

What the Court of Appeals for this Circuit has said with respect to licenses required of restaurants in Virginia is equally true with reference to licenses required of hospitals in North Carolina. In neither instance does the state attempt to exert any control over the personnel, management or service rendered by the facility involved. It is a matter of common knowledge that a license is required by members of practically all professions and most businesses. To hold that all persons and businesses required to be licensed by the state are agents of the state would go completely beyond anything that has ever been suggested by the courts. The *Williams* case, *supra*, is clear authority for the proposition that the license requirement for hospitals in North Carolina in no way changes the character of the institution from private to public.

STUDENT NURSING PROGRAM AT CONE HOSPITAL

The plaintiffs allege that the participation of the Cone Hospital in training student nurses from Woman's College of the University of North Carolina and the Agricultural and Technical College of North Carolina, both State-supported institutions, should be considered in determining whether the institution is an agency of the State. The program is purely voluntary on the part of the hospital, and the only benefit received is that derived from the creation of a source of well-trained nurses. It is significant, however, that the hospital has no priority to employ any nurses graduating from either college, and must compete for the services of these graduates with other interested hospitals or employers. The monetary value of the services rendered the hospital by the student nurses is not commensurate with the substantial contribution the hospital has made from its own funds and facilities to the furtherance of the program. It is difficult to understand how this program, purely voluntary in nature, and carried on at a substantial monetary sacrifice to the hospital, in any way affects the private character of the hospital. The plaintiffs make the interesting, but in the opinion of the Court, completely untenable, argument that the the hospital, in expending its resources to aid student nurses enrolled at the two State institutions involved, are doing the work of the State, and thereby become agents of the State, "subject to the constitutional restraints of governmental acts to the same extent as private persons who govern a company town." In other words, the plaintiffs make the novel argument that it is the giving of assistance to the State, rather than receiving assistance, that changes the character of the hospital. There is no suggestion that either educational institution exercises any control whatever over the hospital, or attempts to direct any of its policies. The program does not relieve the hospital of any of

its personnel requirements. The students participating in the program are not employees of the State, and they participate in the educational program provided by the hospital on a purely voluntary basis. The assertion that the participation of the hospital in this program in any way affects the character of its operation is completely unsupported by any authority that has been brought to the attention of the Court. There is an interesting discussion of a somewhat related problem by Judge Matthews in *Mitchell v. Boys Club of Metropolitan Police, D. C.*, 157 F. Supp. 101 (D. C., D. C. 1957).

ALLOCATION OF HILL-BURTON FUNDS TO DEFENDANT HOSPITALS

Both defendant hospitals have received substantial federal funds under the Hill-Burton Act[6] in aid of their construction and expansion programs. These funds were allocated to the defendants by the North Carolina Medical Care Commission, an agency of the State. The Cone Hospital has received $1,269,950.00 under the Hill-Burton Program, or 15 per cent of its total construction expense, and Wesley Long Hospital has received, or will receive, under the same program, the sum of $1,948,800.00, or 50 per cent of its construction expense. All funds received, or to be received, by both hospitals were allocated and granted to, and accepted by, the hospitals with the express written understanding that admission of patients to the hospital facilities might be denied because of race, color or creed. This understanding was consented to by the Surgeon General of the United States and the North Carolina Medical Care Commission, acting pursuant to Section 291e(f) of Title 42, United States Code (Hill-Burton Act), and Public Health

[6] 42 USCA §291, et seq.

Service Regulations, 42 CFR § 53.112. These statutes and regulations permit the Surgeon General to waive the requirement of nondiscrimination on the basis of race upon a finding that separate but equal facilities are available for separate population groups.

Racial discrimination, it should be emphasized, is permitted, not required. As evidence of the fact that the defendants do not consider themselves obligated under the agreement permitting segregation, the Cone Hospital has for some time admitted Negro patients on a limited basis. Additionally, the defendants have repeatedly stated, both in their briefs and oral arguments, that they in no way rely upon the provisions of the Hill-Burton Act, or their agreement with the North Carolina Medical Care Commission, which permit discrimination. Under these circumstances, they earnestly contend, and at the time of the oral arguments both parties conceded, that the Hill-Burton funds received by the defendant hospitals should be considered as unrestricted funds.

The plaintiffs also place considerable importance upon the fact that recipients of Hill-Burton funds are required to conform to certain provisions of the Public Health Service Regulation which sets forth detailed minimum requirements and standards for the construction and equipment of hospitals. They emphasize that this is an additional and important involvement the defendants have with a public agency. It can fairly be said, however, that the only significance of these requirements is to insure properly planned and well constructed facilities that can be efficiently operated. It is significant that Section 291m of the Act[7] provides

"Except as otherwise specifically provided, nothing in this subchapter shall be construed as conferring upon any

---

[7] 42 USCA § 291m.

federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital, diagnostic or treatment center, rehabilitation facility, or nursing home with respect to which any funds have been or may be expended under this subchapter."

In *Eaton v. Bd. of Managers of James Walker Memorial Hospital*, 4 Cir., 261 F. 2d 521, affirming 164 F. Supp. 191 (E.D. N.C., 1958), cert. den., 359 U. S. 984, 3 L. Ed. 2d 934, 79 S. Ct. 941 (1958), the land upon which the hospital was constructed was donated by the City and County. These governmental units also made annual contributions to the operation of the hospital for a period of many years. These contributions in the form of land and money were held insufficient to make the hospital subject to the inhibitions of the Fourteenth Amendment.

The provisions of the Hill-Burton Act were recently considered by the Supreme Court of Appeals of the Commonwealth of Virginia in Khoury v. Community Memorial Hospital, Inc., 203 Va. 236, 123 S.E. 2d 533, (1962). The hospital there was a non-stock, nonprofit corporation chartered under the laws of Virginia to establish, construct and maintain a hospital. More than half of its construction funds were contributed by the federal government under the Hill-Burton Act, another portion was contributed by the Commonwealth of Virginia, and the balance provided by local subscriptions. The management of the hospital was vested in a self-perpetuating board of trustees. The Court held, at page 538:

"We next turn to the question of whether the use of federal and state funds for construction thereby constituted the hospital a public corporation.

"The distinctions between a public and private corporation have been so carefully drawn and so long recognized

that we experience no difficulty in answering the question in the negative."

* * * * *

"The hospital is not owned by the federal or state government, albeit federal and state funds may have made its construction possible. It is not an instrumentality of government for the administration of any public duty, although the service it performs is in the public interest. Its officers are not appointed by and are not representatives of government, notwithstanding that their authority stems from legislative enactment. Under these circumstances, the hospital falls squarely within the time-honored definition of a private corporation."

Since no state or federal agency has the right to exercise any supervision or control over the operation of either hospital by virtue of their use of Hill-Burton funds, other than factors relating to the sound construction and equipment of the facilities, and inspections to insure the maintenance of proper health standards, and since control, rather than contribution, is the decisive factor in determining the public character of a corporation, it necessarily follows that the receipt of unrestricted Hill-Burton funds by the defendant hospitals in no way transforms the hospitals into public agencies.

TOTAL GOVERNMENTAL INVOLVEMENT AND PARTICIPATION

While the plaintiffs argue that each of the contacts defendant hospitals have with governmental agencies is important, and each has a material bearing on the public character of both hospitals, the main thrust of their argument is that the totality of governmental involvement makes the hospitals subject to the restraints of the Fourteenth Amendment. For this argument they mainly rely upon *Burton* v. *Wilmington Parking Authority*,

365 U. S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961). But a careful reading of this case does not support plaintiffs' argument. The *Burton* case involves the right of Eagle Coffee Shop, Inc., the lessee of the Wilmington Parking Authority, *an agency of the State of Delaware*, to refuse to serve the plaintiff food or drink solely because of his race. This is a situation far different from the facts in this case. After specifically defining the limits of its inquiry, the Supreme Court only held that "when a State *leases public property* in the manner and for the purpose shown . . . the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." (Emphasis supplied). This same general principle of law had earlier been pronounced by this Circuit in *City of Greensboro v. Simkins*, 4 Cir., 246 F. 2d 425 (1957), affirming 149 F. Supp. 562 (M. D. N. C., 1957).

The defendants, on the other hand, argue that if neither of the contacts they have with a public agency makes them an instrumentality of government, the same result would necessarily follow with respect to the total of such contacts. In other words, the defendants argue that zero multiplied by any number would still equal zero. They place principal reliance upon *Eaton v. Bd. of Managers of James Walker Memorial Hospital*, 4 Cir., 261 F. 2d 521, affirming 164 F. Supp. 191 (E. D. N. C., 1958), cert. den. 359 U. S. 984, 3 L. Ed. 2d 934, 79 S. Ct. 941 (1958), in support of their position. The facts in the *Eaton* case more clearly resemble the facts in the case under consideration than any decision that has been cited by either side. The land upon which the hospital was constructed was conveyed to the James Walker Memorial Hospital by the city and county, to be held in trust for the use of the hospital so long as it should be maintained as such for the benefit of the city and county, with reverter to the city and county in case of its disuse or abandon-

ment. This certainly involved a substantial financial contribution by public agencies to the hospital. The presence of the reverter clause makes the conveyance even more significant. The city and county made substantial appropriations to the hospital over a long period of time. There were other significant contacts with public agencies, all of which are referred to in the opinion. Additionally, while not discussed by either the District Judge or the Court of Appeals, presumably for the reason they were considered unimportant factors, the hospital property was exempt from city and county ad valorem taxes,[8] and the hospital was licensed by the North Carolina Medical Care Commission.[9] The only contacts Wesley Long Hospital has with public agencies are (1) exemption from ad valorem taxes (2) state license and (3) the receipt of Hill-Burton funds. All these factors were present in the Eaton case, if city and county funds have the same significance as unrestricted federal funds under the Hill-Burton Act. The only additional contacts Cone Hospital has with governmental agencies are that six of its fifteen trustees are appointed by public officers or agencies, and it aids two publicly owned colleges in their nursing program. It has been determined that these contacts have no bearing whatsoever on the public character of the hospital.

Both hospitals are effectively managed and controlled by a self-perpetuating board of private trustees. No public agency has the power to exercise any supervision or control over the management or operation of either hospital. Neither hospital is required to discriminate against any citizen because of race, and no right to do so is claimed by either hospital by reason of its agreement with the Surgeon General of the United States

---

[8]Sections 105-296 and 105-297, General Statutes of North Carolina.

---

[9]Section 131-126.3, General Statutes of North Carolina.

and North Carolina Medical Care Commission. Under these circumstances, it cannot be said that the defendants waived their privacy by accepting Hill-Burton funds. *Board of Trustees of Vincennes University v. State of Indiana*, 55 U. S. (14 How.) 268, 14 L. Ed. 416 (1852).

DECLARATORY RELIEF

The plaintiffs drew into question the constitutionality of the separate but equal provisions of the Hill-Burton Act, and the United States moved to intervene pursuant to the provisions of 28 USC § 2403. The intervention was allowed. The United States has now moved for an order declaring unconstitutional, null and void the separate but equal provisions of Section 291e(f) of the Hill-Burton Act, 42 USC § 291e(f), and enjoining the defendants from discriminating on account of race or color in the admission of patients to their facilities.

It is a cardinal principle that courts do not deal in advisory opinions, and avoid rendering a decision on constitutional questions unless it is absolutely necessary to the disposition of the case. *Barr v. Matteo*, 355 U. S. 171, 2 L. Ed. 2d 179, 78 S. Ct. 204 (1957). If the defendants were claiming any right or privilege under the separate but equal provisions of the Hill-Burton Act, it would perhaps be necessary to the disposition of the case to rule upon the constitutionality of those provisions. Here, however, as earlier stated, the defendants make no such claim, and it is unnecessary for the Court, as requested by the United States, to advise the Surgeon General with respect to his legal obligations under the Act. There has been no showing that the statute in question has resulted in depriving the plaintiffs or any other citizens of their constitutional rights. The only issue involved in this litigation is whether the defendants have become governmental agencies in the constitutional sense

by the acceptance of public funds in the construction and equipment of their hospitals, and their other involvements with public agencies. The constitutionality of the separate but equal provisions of the Hill-Burton Act is not an issue, and a declaration as to its constitutionality is not necessary to the disposition of the case.

What the plaintiffs and the United States are really asking in their prayer for declaratory relief is an order desegregating all private facilities receiving Hill-Burton funds over a period of years, even though the funds were given with the understanding that the private facilities might retain their freedom to conduct their private affairs in their own way. This court is not prepared to grant the declaratory relief prayed for, thereby retroactively altering established rights, particularly when it is unnecessary to do so, in deciding the jurisdictional question.

CONCLUSIONS OF LAW

1. The various contacts the defendant hospitals have been shown to have with governmental agencies, both federal and state, do not make them instrumentalities of government in the constitutional sense, or subject them to either the Fifth Amendment or the Fourteenth Amendment to the United States Constitution.

2. The defendants are private persons and corporations, and not instrumentalities of government, either state or federal, and none of the defendants are subject to the inhibitions of the Fifth Amendment or the Fourteenth Amendment to the United States Constitution.

3. This action is one brought by individuals seeking redress for the alleged invasion of their civil rights by other individuals

or private corporations, and this Court has no jurisdiction over the subject matter of the action.

4. The motions for summary judgment by the plaintiffs and the United States should be denied, and the motion of the defendants to dismiss the action for lack of jurisdiction over the subject matter should be granted.

EDWIN M. STANLEY
United States District Judge

December 5, 1962

Constitutional Provisions
Statutes
Regulations

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Hospital Survey and Construction Act (Hill-Burton Act), 60 Stat. 1041 (1946); 42 U.S.C. § 291.

Subchapter IV—Construction of Hospitals And Other Facilities

Section 291. Declaration of purpose with respect to construction of hospitals

"The purpose of sections 291a-291n of this title is—

"(a) to assist the several States to inventory their existing hospitals (as defined in section 291i(e) of this title), to survey the need for construction of hospitals, and to develop programs for construction of such public and other nonprofit hospitals as

will, in conjunction with existing facilities, afford the necessary physical facilities for furnishing adequate hospital, clinic, and similar services to all their people;

"(b) to assist in the construction of public and other nonprofit hospitals in accordance with such programs; and

* * * *

Section 291e. General Regulations

"Within six months after August 13, 1946, the Surgeon General, with the approval of the Federal Hospital Council and the Secretary, shall by general regulation prescribe—

* * * *

"State plan"

"(f) That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color; and shall provide for adequate hospital facilities for persons unable to pay therefor. Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group, and (2) there will be made available in each such hospital or addition to a hospital a reasonable volume of hospital services to persons unable to pay therefor, but an exception shall be made if such a requirement is not feasible from a financial standpoint.

* * * *

Section 291m. State control of agencies

"Except as otherwise specifically provided, nothing in this subchapter shall be construed as conferring on any Federal of-

ficer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital, diagnostic or treatment center, rehabilitation facility, or nursing home with respect to which any funds have been or may be expended under this subchapter.

CIVIL RIGHTS ACT

17 Stat. 13 (April 20, 1871); 42 USC § 1983
"Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

REGULATION

42 CFR 53.112, 21 Fed. Reg. 9841 (Dec. 12, 1956).
"Nondiscrimination.

Before a construction application is recommended by a State agency for approval, the State agency shall obtain assurance from the applicant that the facilities to be built with aid under the Act will be made available without discrimination on account of race, creed, or color, to all persons residing in the area to be served by that facility. However, in any area where separate hospital, diagnostic or treatment center, rehabilitation or nursing home facilities, are provided for separate population groups, the State agency may waive the requirement of assurance from the construction applicant if (a) it finds that the plan otherwise makes equitable provision on the basis of need for facilities and

services of like quality for each such population group in the area, and (b) such finding is subsequently approved by the Surgeon General. Facilities provided under the Federal Act will be considered as making equitable provisions for separate population groups when the facilities to be built for the group less well provided for heretofore are equal to the proportion of such group in the total population of the area except that the State plan shall not program facilities for a separate population group for construction beyond the level of adequacy for such group."

Extracts From Legislative History of Hill-Burton Act

Hearings before the Senate Committee on Education and Labor on S. 191, 79th Congress, 1st Sess.

Statement of Dr. Donald C. Smeltzer, President of the American Hospital Association:

"This committee is undoubtedly familiar with the background of the nonprofit community hospital. Organized by the citizens of the community, these hospitals now render a major portion of the general hospital care to the citizens of this country. Many of these voluntary hospitals are operated by the various churches. Their organization and support results from the finest attitudes in our society. . . . [page 14]

* * *

"Senator Taft. Dr. Smeltzer, as I understand it, and as the Surgeon General says, there shall be so many dollars, $100,000,000; say $5,000,000 allotted to the State of Ohio, that in Ohio, say, the Federal grant will be 50 per cent, then any private hospital can apply for that grant.

"Dr. Smeltzer. Yes, sir.

"Senator Taft. And then the Surgeon General may grant that Federal grant directly, we will say, for the enlargement of the private hospital, and when that money is gone that is owned by the private hospital, is it not?

"Dr. Smeltzer. Yes, sir.

"Senator Taft. It is a gift for that particular private hospital.

"Dr. Smeltzer. Yes, Sir." (page 22)

Statement of Dr. Thomas Parran, Surgeon General, United States Public Health Service:

"DR. PARRAN. From the above concept, it should be clear that I am not recommending a system of federally operated hospitals. On the contrary, what I am suggesting and what Senate bill 191 would provide is that the Federal Government help the States to fill out the missing pieces in the present hospital pattern and that the hospitals continue to be under local government and voluntary management as they are now. Quite naturally, a completely integrated hospital system such as I have described is an objective to be accomplished by education, mutual agreement, voluntary effort and such encouragement as government may be able to offer." (Page 60)

Statement of William B. Umstead, appearing as personal representative of the Governor of North Carolina:

"In February 1944 the Governor of our State, appointed a commission of 50 representative North Carolinians, including leading physicians and laymen, to make a survey of our hospital and medical needs and to recommend a program to the people and the General Assembly of North Carolina. [page 283]

* * *

"SENATOR SMITH. Mr. Umstead, you confirm Dr. Reynolds' statement that probably, if this plan goes through, North Carolina can take care of the maintenance problem. I notice in your bill you provide maintenance for the indigent people who cannot provide for their own care.

"MR. UMSTEAD. Yes, Senator. It is not contemplated, however, under the proposed plan in our State, to which I referred, that the State government will have anything to do, as such, with the local operation of the

hospital unit or public-health center, except insofar as it would be necessary for that hospital unit to meet the requirements of the commission before it could participate in the plan and receive payment for indigent patients.

"SENATOR SMITH. You plan to decentralize right down to the local unit?

"MR. UMSTEAD. Yes, sir. The financial condition of the area or the county, the means at their command, their own efforts, the needs of the hospital, and various other things, would enter into the decision of our commission, as I understand it, in dealing with the necessity of a hospital at that particular place. When the necessity has been established in accordance with the qualifications laid down by the commission—and, of course, I do not know what they will be, except as to certain restrictions and requirements set forth in the bill—have been complied with and the construction completed and the hospital equipped, I know of nothing in the proposed State legislation which would give to the commission the control of the operation of that hospital unit. [Page 284]

* * *

"SENATOR DONNELL. Would you favor the acceptance by your State of Federal funds for the operation of a hospital if that acceptance involved giving to the Federal Government the right to determine the number of doctors, the number of nurses, the medical treatment, and the type of equipment in the local hospital?

"MR. UMSTEAD. You mean if it gave to the Federal Government the right to control, direct, and supervise the operation of the hospital unit?

"SENATOR DONNELL. Or to veto the views of the local authorities.

"MR. UMSTEAD. Speaking for myself, Senator, I would not be in favor of that

"SENATOR DONNELL. Yes, sir." (Page 285)

The *House Committee Report* (H. Rep. No. 2519, 79th Cong., p. 8) states that regulations under 42 U.S.C. 291e(f) will "relate solely to administration of the plan submitted by the State agency and do not in any way relate to the administration of hospitals."

Senator Hill, co-sponsor of the Bill, stated:

"The bill does not provide a Federal program of hospital construction. It does provide a program of Federal aid to the states and their localities for hospital construction." 91 Cong. Rec. 11714.

Senate Report No. 6[illegible]4, 79th Cong., 1st Sess., p. 7, states:

"The bill is not a Federal hospital construction bill. The need for a country-wide program of hospital construction has been demonstrated. It remained for the committee to consider and determine the relationship that should exist between the Federal Government and the States in planning and carrying out such a program. The committee believes that a Federal-aid program of the character set forth in the reported bill, which will supplement State and local funds for planning and carrying out a construction program, but will at the same time encourage the States to assume the responsibility for carrying out the program to the greatest possible extent consistent with a proper check upon expenditure of Federal appropriations, will be most effective in a long-range hospital construction program.

Examples of Federal Grants-in-aid to Colleges and Private Institutions

SMALL BUSINESS ACT

72 Stat. 384 (July 18, 1958); 15 U.S.C. A°631, et seq.

The Small Business Administration is authorized to make loans to enable small-business concerns to finance plant construction and expansion, the acquisition of equipment and materials, and to supply them with working capital; it is also empowered to make grants to any college or school of business, for studies, research and counselling concerning the managing, financing and operation of small-business enterprises. § 636(d).

For the fiscal years 1958-1963 the Small Business Administration has obligated $5,200,000 of public funds for research and development under the Act, and of that amount $3,300,000 was granted to non-profit educational institutions, colleges and organizations.

NATIONAL AERONAUTICS & SPACE ACT OF 1958

72 Stat. 426 (July 29, 1958); 42 U.S.C. 2451, et seq.

The National Aeronautics & Space Administration is authorized to enter into such contracts and transactions as may be necessary in the conduct of its work with any person, association, corporation, or educational institution, and to the maximum extent possible in a manner which will enable small-business concerns to participate equitably and proportionately in the conduct of such work. § 2473(b)(5).

For the fiscal years 1958-1963, the NASA obligated $5,658,958,000 of public funds for research and development under the Act, and of that amount, $662,710,000 was granted to non-profit educational institutions, colleges and organizations.

ATOMIC ENERGY ACT OF 1954

68 Stat. 921 (August 30, 1954); 42 U.S.C. § 2011, et seq.

The Atomic Energy Commission is authorized under the program established by that Act "to make grants and contributions to the cost of construction and operation of reactors and other facilities and other equipment to colleges, universities, hospitals, and eleemosynary or charitable institutions for the conduct of educational and training activities relating to the fields" enumerated in the Act (Sec. 2051 (b)).

For the fiscal years 1958-1963, the Atomic Energy Commission obligated $5,152,003,000 of public funds for research and development under the Act, and of that amount $1,826,910,000 was granted to non-profit educational institutions, colleges and organizations. Stanford University alone holds a contract with the Atomic Energy Commission to build and operate on its campus a $114,000,000 linear accelerator center.

NATIONAL SCIENCE FOUNDATION ACT OF 1950

64 Stat. 149 (May 10, 1950); 42 U.S.C. 1861, et seq.

The National Science Foundation is authorized to award scholarships and graduate fellowships for scientific study or work at non-profit institutions of higher education, selected by the recipient of such aid (§ 1869), and to enter into contracts or arrangements with organizations for their carrying on of such basic scientific research activities as the Foundation deems necessary (§ 1870(c)).

For the fiscal years 1958-1963, the National Science Foundation obligated $499,834,000 of public funds for research and development under the Act, and of that amount $455,602,000 was granted to non-profit educational institutions, colleges and research center.

HIGHER EDUCATION FACILITIES ACT OF 1963

H. R. 6143; (December 10, 1963)

There is established a program of federal grants to institutions of higher education, both public and non-profit educational institutions, for the construction, rehabilitation, or improvement of classrooms, laboratories, and libraries, to be administered by the Commissioner of Education (Section 101).

Any state desiring to participate in the grant program must have a State Commission and submit through it a State plan for participation in the grant program (Section 105). The Act further provides that no department, agency, or employee of the Uinted States shall, under authority of the Act, exercise any direction, supervision, or control over the personnel, curriculum, or administration of any educational institution (Section 407).

The Act authorizes appropriations of $1.195 billion for the first three years of operation.

Office-Supreme Court, U.S.
FILED
FEB 17 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 776

THE MOSES H. CONE MEMORIAL HOSPITAL, *et al.*,
Petitioners,

—v.—

G. C. SIMKINS, *et al.*;
and the
UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF RESPONDENTS G. C. SIMKINS, *ET AL.*

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

CONRAD O. PEARSON
203½ East Chapel Hill Street
Durham, North Carolina

Attorneys for G. C. Simkins, et al.

INDEX

	PAGE
Statement	1
Federal Funds for Hospital Construction	4
General Facts About Hill-Burton Program	5
The North Carolina State Plan	5
Division of Federal and State Controls	6
Opinions of the Courts Below	6
ARGUMENT	9
I. The Decision of the Court Below Enjoining Racial Discrimination at Hospitals Closely Regulated and Controlled by Government and Receiving Large Amounts of Public Funds as Part of a State Plan for Hospital Construction Was Clearly Correct and Presents No Questions Cognizable Under Rule 19(1)(b) of the Rules of This Court	9
II. Those Portions of Title 42 U.S.C. §291e(f) and 42 C.F.R. §53.112 Which Authorize Racial Discrimination Are Clearly Unconstitutional	15
CONCLUSION	18

TABLE OF CASES

Ashwander v. Tenn. Valley Authority, 297 U. S. 288	16
Bailey v. Patterson, 369 U. S. 31	15
Baker v. Carr, 369 U. S. 186	17

PAGE

Baldwin v. Morgan, 287 F. 2d 754 (5th Cir. 1961) 16
Bolling v. Sharpe, 347 U. S. 497 ..... 9, 15
Brown v. Board of Education, 347 U. S. 483 ..... 9, 10, 15, 16
Burton v. Wilmington Parking Authority, 365 U. S. 715 ..... 9, 10, 13, 16

Civil Rights Cases, 109 U. S. 3 ..... 9, 14
Cooper v. Aaron, 358 U. S. 1 ..... 9, 14

Dawson v. Mayor and City Council of Baltimore, 220 F. 2d 387 (4th Cir. 1955) aff'd 350 U. S. 877 15

Gantt v. Clemson Agricultural College of S. Car., 320 F. 2d 611 (4th Cir. 1963) cert. den. 375 U. S. 814 16
Gayle v. Browder, 352 U. S. 903 15

Hirabayashi v. United States, 320 U. S. 81 9
Holmes v. City of Atlanta, 350 U. S. 879 15

Johnson v. Virginia, 373 U. S. 61 15

Lombard v. Louisiana, 373 U. S. 267 16

McCabe v. Atchison Topeka and S. F. R. Co., 235 U. S. 151 16

New Orleans City Park Improvement Association v. Detiege, 358 U. S. 54 15

Simkins, et al. v. Moses Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963) 7, 8, 10, 11, 13, 14
State Athletic Commission v. Dorsey, 359 U. S. 533 15

Turner v. Memphis, 369 U. S. 350 ..... 15, 17

PAGE

Statutes and Regulations Involved

21 Fed. Reg. 9841 1

42 C.F.R. §53.111 5

42 C.F.R. §53.112 ..... 1, 5, 7, 10, 15

42 U.S.C. §291 1

42 U.S.C. §291a 8

42 U.S.C. §291e(f) 5, 7, 8, 10, 14, 15

42 U.S.C. §291f(a)(7) 3, 12

42 U.S.C. §291f(d) 3, 12

42 U.S.C. §291h(d) 12

42 U.S.C. §291h(e) 12

42 U.S.C. §291m 11

State Statutes

N. C. Gen. Stats. §131-120 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 776

THE MOSES H. CONE MEMORIAL HOSPITAL, *et al.*,

Petitioners,

—v.—

G. C. SIMKINS, *et al.*,

and the

UNITED STATES OF AMERICA.

BRIEF IN OPPOSITION TO CERTIORARI ON BEHALF OF RESPONDENTS G. C. SIMKINS, *ET AL.*

Statement

Plaintiff, a group of Negro physicians, dentists and patients, brought this class action to enjoin two hospitals in Greensboro, North Carolina (The Moses H. Cone Memorial Hospital and Wesley Long Community Hospital, hereinafter called Cone and Long hospitals) and their administrators from continuing to deny them and other Negroes admission to staff and treatment facilities on the basis of race. They also sought declaration that a portion of the Hill-Burton Act (Hospital Survey and Construction Act of 1946, Act of August 13, 1946, 60 Stat. 1041, as amended; 42 U. S. C. §§291, *et seq.*) and a regulation pursuant thereto (42 C. F. R. §53.112; 21 Fed. Reg. 9841) were unconstitutional. These provisions authorize racial segregation or exclusion of Negroes from hospitals receiving grants under

the Act on a separate but equal theory, as an exception to a statutory requirement of racial nondiscrimination.

Long is a charitable hospital governed by a self-perpetuating board of twelve trustees (60a, 200a).* Cone too is a charitable hospital governed by fifteen trustees chosen for four year terms, as follows (50a-52a):

(a) Three by Governor of North Carolina;

(b) One by Greensboro City Board of Commissioners;

(c) One by Board of Commissioners of Guilford County, North Carolina;

(d) One by Guilford County Medical Society;

(e) Eight were appointed by Mrs. Bertha Cone until her death in 1947; now they are elected by entire Board of fifteen;

(f) One appointed by Board of Commissioners of Watauga County, North Carolina until 1961 amendment to charter; now elected by entire Board.

Both hospitals are licensed to operate under the North Carolina "Hospital Licensing Act" and regulations (122a-157a) which prescribe the management and operations of hospitals in great detail.[1] Enactment of the licensing law

---

* Citations are to appellant's Appendix in the Court of Appeals.

[1] For example, the rules provide among other things for medical staff organization (123a); standards for facilities, organization, and procedures in surgical operating rooms (125a-126a); equipment, organization, and procedures for the obstetric department (126a-131a); separation of pediatric facilities from those for adults and the newborn nursing service (132a); circumstances for administration of anesthesia (132a); clinical pathological laboratories and blood tests (133a); that hospitals have adequate diagnostic x-ray and fluoroscopic examination facilities (134a); designated treatment facilities for emergency or outpatient service (134a);

was a prerequisite to participation in the Hill-Burton program (42 U. S. C. §§291f(a)(7), 291f(d)).

Both hospitals are exempt from *ad valorem* taxes assessed by the City of Greensboro and Guilford County at tax rates of $1.27 and $0.82 per $100 evaluation respectively. The cost of the Hill-Burton construction projects for the two hospitals set forth in this record (Cone: $7,367,023.32; Long: $3,927,385.40) indicates that their property is extremely valuable and that the value of the tax exemption is substantial for each hospital.[2]

Both hospitals have a variety of contacts with government[3] as a result of their involvement in the Hill-Burton hospital construction program. In summary, both hospitals have received large amounts of public funds, paid by the United States to the State of North Carolina and then by North Carolina to the hospitals. They received the funds as a part of a "State Plan" for hospital construction, which contemplates and authorizes them to exclude Negroes. This plan was approved by the Surgeon General of the United States. They are subject to a complex pattern of governmental regulations and controls arising out of Hill-Burton participation.

---

isolation rooms (135a); regulation of hospital pharmacies (135a-136a); and records (136a-138a); organization of the nursing staff, including minimum numbers (138a-139a); detailed provision for hospital food service (139a-145a).

[2] Assuming assessment at 50% of actual value, and given the combined city-county rate of $2.09 per $100, Cone's exemption is worth about $76,985 per annum and Long's is worth about $40,681 per annum.

[3] Cone Hospital also participates in a nurses training program with two tax-supported state schools, the Woman's College of the University of North Carolina and the Agricultural and Technical College of North Carolina (an all Negro school). Student nurses at the schools receive part of their training at Cone (55a-57a) and carry out assignments at the hospital under the supervision of their teachers, including assisting doctors and nurses, treating patients, keeping hospital records, etc.

Federal Funds for Hospital Construction

When this action was commenced, the United States had appropriated $1,269,950.00 to Cone and $1,948,800.00 to Long. Cone's allocation amounted to about fifteen percent of the total construction expenses involved in its two projects. Long's share constituted about fifty percent of the total cost of its three projects (203a-204a).

The following table summarizes the various grants.*

CONE HOSPITAL

Project No. and Year Approved	Purpose	Federal Funds Appropriated 5/8/62	Total Cost of Project	Federal % of Cost
NC-86 (1954)	General hospital construction	$ 462,000.00	$5,277,023.32	—
NC-330 (1960)	Diagnostic and treatment center; general hospital construction	807,950.00	2,090,000.00	—
TOTAL		$1,269,950.00**	$7,367,023.32	17.2%

LONG HOSPITAL

NC-311 (1959)	New hospital construction	$1,617,150.00	$3,314,749.40	—
NC-353 (1961)	Laundry	66,000.00	120,000.00	—
NC-358 (1961)	Hospital Nurses Training School	265,000.00	492,636.00	—
TOTAL		$1,948,800.00**	$3,927,385.40	49.6%

* The District Court found "approximately" 15% for Cone and "approximately" 50% for Long.

** All funds to Cone had been paid as of 5/8/62; $1,596,301.60 had been paid to Long by that date.

* See, generally, Findings 11 through 17 (201a-204a). Further details appear in the original record, Exhibits A through E to plaintiffs' Motion for Summary Judgment. (Parts of Exhibit B appear at 93a-103a.)

General Facts About Hill-Burton Program

The Hill-Burton program requires that states wishing to participate must inventory existing facilities to determine hospital construction needs and develop construction priorities under federal standards. State agencies designated to perform this function are to adopt state-wide plans for hospital construction to be approved by the Surgeon General of the United States. The Act provides for grants of federal funds to construct new or additional facilities for government owned and voluntary nonprofit hospitals.[5]

The Surgeon General has authorized state plans to meet the racial nondiscrimination requirement of 42 U. S. C. §291e(f) by approving plans for separate facilities for "separate population groups" (42 C. F. R. §53.112). When state plans are submitted on this basis, the state agency and the Surgeon General may waive the requirement that facilities built under the Act "be made available without discrimination on account of race, creed or color, to all persons residing in the area to be served by that facility" (42 C. F. R. §53.112; see also, §53.111).

The North Carolina State Plan

In North Carolina the state agency authorized to operate under the Hill-Burton program is the North Carolina Medical Care Commission (N. C. Gen. Stats. §131-120). The Medical Care Commission has adopted and periodically revised a "State Plan" for separate facilities for Negroes and whites in the Greensboro area (120a):

Area	Name of Facility	Location	Existing Acceptable Beds: White	Existing Acceptable Beds: Non-White
B-6	L. Richardson Memorial Hospital	Greensboro	0	91
	Wesley Long Hospital	Greensboro	220	0
	Moses H. Cone Hospital	Greensboro	482	0
	Subtotals		702	91

[5] A useful description of the over-all program and of the various types of hospitals is contained in the "Affidavit and Report" of the General Counsel of

Accordingly, when the various project applications were made by Cone and Long, the required assurance against racial discrimination was waived by the Medical Care Commission and this was approved by the Surgeon General.[6]

Division of Federal and State Controls

The overall plan of the Hill-Burton program reflects a division of power and responsibility between federal and state governments for control and supervision of various matters affecting participating hospitals. These provisions may be sorted into seven categories: (1) control over construction contracts and the construction period; (2) control over details of hospital construction and equipment; (3) control over future operation and status of hospitals; (4) control over details of hospital maintenance and operation; (5) control of size and distribution of facilities; (6) rights of project applicants and state agencies; and (7) regulation of racial discrimination. The character of this "intricate pattern of governmental regulations, both state and federal" is summarized by the Court of Appeals at 323 F. 2d 964-65.

Opinions of the Courts Below

The district court found that racial discrimination was "clearly established" (205a) and that the "sole question" was whether "defendants have been shown to be so im-

---

the Department of HEW who was the principal technical draftsman of the law (173a-188a). This Report was filed in the district court by the United States.

[6] On Projects NC-86 and NC-330, the Cone Hospital initially gave an assurance of nondiscrimination, but this was withdrawn with the approval of the Medical Care Commission and the Surgeon General, on the ground that "the non-discrimination agreement was erroneously executed as a result of clerical inadvertence" for which the Commission was responsible (104a-106a, 201a-202a).

pressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments . . . " (206a-207a). After examining defendants' various relationships with federal and state governmental agencies, the court concluded that defendants were not subject to constitutional restraints against discrimination (221a). For this reason, the court refused to decide the validity of the separate but equal provision of the Hill-Burton Act (220a).

On November 1, 1963 the Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed the decision of the District Court, 323 F. 2d 959 (4th Cir. 1963). The Court, per Sobeloff, Chief Judge, found the necessary "'degree of state [in the broad sense, including federal] participation and involvement'", 323 F. 2d at 967,[7] present as a result of the participation by the hospitals in the Hill-Burton program. The court emphasized massive use of public funds, "extensive state-federal sharing" in a common plan for state hospital development, and that the Hill-Burton program was not limited to the granting of aid to individual hospitals: "'It shows rather a Congressional design to induce the states upon joining the program to undertake the supervision of the construction and maintenance of adequate hospital facilities throughout their territory. Upon joining the program a participating state in effect assumes as a state function the obligation of planning for adequate hospital care.'" 323 F. 2d at 967-69. In addition, the court emphasized that the challenged discrimination had been sanctioned affirmatively by state and federal governments pursuant to federal law and regulation. 323 F. 2d at 968; 42 U. S. C. §291e(f); 42 C. F. R. §53.112.

The court also held that the constitutionality of the provisions of the Hill-Burton Act which authorized racial

[7] The brackets are in the court's opinion.

discrimination was properly before it. Finding in the legislative history of the Act a desire on the part of Congress to permit the states to develop programs of hospital construction that would provide adequate service "to all their people" 42 U. S. C. §291a, the court held, "it served the dominant Congressional purpose best to prune from the statutory provision only that language which adopted what is now known to be an unconstitutional means of establishing a constitutional end." 323 F. 2d at 969. The court, therefore, let stand the general prohibition against discrimination in 42 U. S. C. §291e(f) and found unconstitutional the exception tolerating separate but equal facilities:

> . . . but an exception shall be made in cases where separate hospital facilities are provided for separate population groups if the plan makes equitable provisions on the basis of need for facilities and services of like quality for each such group . . .

ARGUMENT

I.

The Decision of the Court Below Enjoining Racial Discrimination at Hospitals Closely Regulated and Controlled by Government and Receiving Large Amounts of Public Funds as Part of a State Plan for Hospital Construction Was Clearly Correct and Presents No Questions Cognizable Under Rule 19(1)(b) of the Rules of This Court.

Decisions of this Court leave little doubt that governmental action as broad, significant, and effective as that found in this case involves Fifth Amendment due process[8] and Fourteenth Amendment due process and equal protection[9] strictures against racial discrimination. Racial discrimination is constitutional only when "unsupported by State authority in the shape of laws, customs, or judicial, or executive proceedings" or when "not sanctioned in some way by the State."[10] Discrimination is forbidden when the State participates "through any arrangement, management, funds or property"[11] or when the State places its "power, property or prestige" behind the discrimination.[12]

In this case racial segregation, which repeatedly has been held to constitute discrimination *per se* since *Brown*

---

[8] *Bolling* v. *Sharpe*, 347 U. S. 497; *Hirabayashi* v. *United States*, 320 U. S. 81, 100.

[9] *Brown* v. *Board of Education*, 347 U. S. 483; *Cooper* v. *Aaron*, 358 U. S. 1, 19.

[10] *Civil Rights Cases*, 109 U. S. 3, 17.

[11] *Cooper* v. *Aaron*, 358 U. S. 1, 4, 19.

[12] *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 725.

v. *Board of Education*, 347 U. S. 483, has been explicitly authorized by a federal statute[1] antedating *Brown*. The discrimination has been approved by agencies and officials of North Carolina and the United States (93a, 99a, 113a, 120a). Large sums of public moneys have been expended by government to support the hospitals. They have submitted to a comprehensive pattern of state and federal controls in return for these funds and have become part of a state master-plan for hospital construction on a statewide basis. The hospitals are aided by the state because they fulfill a public function which the state would have to perform if the hospitals did not. North Carolina has granted these hospitals the power to operate and the privilege of receiving federal aid.[2] See 323 F. 2d at 967-68.

The petition for certiorari filed by the hospitals suggests that the Court of Appeals determined that the hospitals should be restrained from racial discrimination solely on the ground that they have received money from the United States. Reasoning from this faulty premise, petitioners urge that the court below sanctioned a rule of limitless application which would apply the Constitution to every area of human endeavor. The parade of "horribles" suggested by petitioners (see Petition for Certiorari, pp. 8-10) bears, however, no relationship to the carefully worded and limited opinion of the Court of Appeals. In their zeal to obtain review before this Court, petitioners have asked the Court to review a decision never rendered.

Applying the principles of *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, the Court of Appeals found

[1] 42 U. S. C. §291e(f); 42 C. F. R. §53.112.

[2] In addition, as to Cone, two other factors should be noted: (1) the State has passed legislation directing public officials to appoint members of its governing Board and (2) the State has chosen to train students enrolled at public colleges at the hospital.

that receipt of large sums as part of a complex statutory plan[15] for the construction of hospitals on a state-wide basis resulted in application of the Fifth and Fourteenth Amendments, 323 F. 2d at 965-67. The court also relied on the Congressional purpose (as shown in the legislative history of the Hill-Burton Act) to induce the states to assume the responsibility for planning the construction, financing, and regulation of adequate hospital facilities throughout the state, and the affirmative sanction of the hospitals' racial discrimination given by Hill-Burton Act and regulations, 323 F. 2d at 968.

The decision of the Court of Appeals is rooted in the peculiar soil of the Hill-Burton program. For example, these hospitals are subject to a variety of government controls by virtue of their participation in the federal-state hospital construction program. The character of the physical facilities and the equipment of the hospitals is closely controlled by both federal and state governments. The effect of this regulation of construction and equipment on the future operations of the hospitals is manifest. Requir-

[15] Petitioners earnestly contend that the Hill-Burton Act itself expressly disclaims any federal right to exercise supervision or control over the administration of any hospitals receiving funds under the Act and rely on 42 U. S. C. §291m. Section 291m states:

> *State control of agencies.*—Except as otherwise specifically provided, nothing in this subchapter shall be construed as conferring on any federal officer or employee the right to exercise any supervision or control over the administration, personnel, maintenance, or operation of any hospital, diagnostic or treatment center, rehabilitation facility, or nursing home with respect to which any funds have been or may be expended under this subject.

Petitioners' reliance on this provision is misplaced. The provision states, "except as otherwise specifically provided," and the Hill-Burton Act and regulations specifically provide for a great amount of control. 323 F. 2d at 964, 965. Secondly, the provision is entitled, "State control of agencies," and can at the most be taken to mean that where there is possible conflict between state and federal agencies, state regulation should prevail.

ing that a hospital build and arrange a particular department and stock it with approved equipment obviously determines the character of the service the hospital will render in the future. Beyond this, the federal statute requires that the states must directly regulate the details of hospital maintenance and operation. In order to participate in the Hill-Burton program North Carolina had to undertake an elaborate regulatory and licensing scheme (42 U. S. C. §§291f(a)(7), 291f(d)). This state control over the defendant, hospitals' operation is exact and detailed (see footnote 1, *supra*).

The funds paid to these hospitals under the Hill-Burton Act are to be used solely for carrying out the project as approved by the State and Surgeon General.[16] If the hospitals sell or transfer ownership within twenty years to anyone not qualified under the Act to apply for funds or not approved by the state agency, or if the hospitals cease to be nonprofit, the United States is authorized to recover the present value of the federal share of the approved project.[17]

Under Hill-Burton, the number and distribution of hospital beds in an area is decided by State and Federal Governments. Once funds are granted bringing an area up to the standard of hospital beds considered adequate for the population, no further beds can be programmed. If North Carolina had chosen to build publicly owned hospitals in Greensboro, Cone and Long could have been denied all federal aid. On the other hand, the aid granted them now prohibits the construction of duplicating city, county, or other nonprofit facilities with federal aid. The participat-

---

[16] 42 U. S. C. §291h(d).

[17] 42 U. S. C. §291h(e).

ing hospitals have become the chosen and exclusive instruments to carry out governmental objectives.

In addition to operating "as integral parts of comprehensive joint or intermeshing state and federal plans," 323 F. 2d at 967, the Cone and Long hospitals are the beneficiaries of approximately 1.2 and 1.9 million dollars, respectively, paid to them through the Treasurer of the State of North Carolina, from the United States of America under the Hill-Burton program. Prior to receipt of Hill-Burton assistance, Long Hospital operated a 78-bed hospital considered obsolete by North Carolina (160a) and unsuitable by the United States of America (93a). Long has now constructed and operates a 220-bed modern hospital, a nurses training school and has a $120,000 laundry constructed under Hill-Burton with 50 per cent federal funds. Cone Hospital has completed construction of a 300-bed hospital, a 182-bed addition, and a diagnostic and treatment center with the assistance of the United States and the State of North Carolina under the Hill-Burton program.

These federal grants in excess of a million dollars to each hospital distributed in accordance with state and federal priorities obviously are substantial. (The tax exempt status of the hospital's property increases the financial subsidy. Cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. at 724.)

The effect of governmental subsidy upon an otherwise private entity is highly relevant in deciding whether the restraints of the Constitution should apply. The argument of petitioners that the effect of three million dollars of public funds on the hospitals is insignificant for purposes of the Fifth and Fourteenth Amendments is erroneous. Here, there is a governmental participation through an "arrangement," "funds," and "property" calling for the ap-

plication of constitutional principles against discrimination. *Cooper* v. *Aaron*, 358 U. S. 1, 4, 19. It would be difficult to know what *Cooper* v. *Aaron* means if it does not embrace contributions of funds in the million dollar range to build tax exempt property.

Affirmative Governmental Sanction of Discrimination

In addition to the interrelation of the hospitals with government, an additional factor compels the conclusion that the discrimination practiced is within the purview of the Constitution. This discrimination was sanctioned affirmatively by a federal statute and regulations, and by a state plan for hospital construction on a segregated basis. The conduct of private persons is insulated from constitutional requirements only insofar as it is "unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings" or is "not sanctioned in some way by the State." *Civil Rights Cases*, 109 U. S. 3, 17. Here the affirmative state sanction of racial segregation (the state plan for segregation in the Greensboro area) enables the hospitals to avoid giving an assurance not to discriminate as a condition of receiving the funds. This is in accord with the Hill-Burton Act (42 U. S. C. §291e(f)) which allows the states to authorize segregation in either government hospitals or nonprofit hospitals. As segregation is supported by federal statute and regulations and by state executive decisions, i.e., the state plan, the decision of the Court of Appeals enjoining discrimination is clearly correct. See 323 F. 2d at 968 n. 16, and cases cited.

II.

Those Portions of Title 42 U. S. C. §291e(f) and 42 C. F. R. §53.112 Which Authorize Racial Discrimination Are Clearly Unconstitutional.

The provisions of the Hill-Burton Act and regulations declared unconstitutional by the court below authorize hospitals receiving federal funds to segregate or exclude Negroes on a separate but equal basis as an exception to a general statutory policy of nondiscrimination.

Since *Brown* v. *Board of Education*, 347 U. S. 483, the "separate but equal" doctrine has been repudiated in regard to every type of facility to which it was applied.[18] Insofar as the Hill-Burton Act and federal regulations authorize the defendants as agencies of the state and federal governments to engage in racial discrimination, these provisions obviously conflict with the Fifth and Fourteenth Amendments. *Bolling* v. *Sharpe*, 347 U. S. 497; *Brown* v. *Board of Education*, *supra*.

The hospitals seek to avoid the massive weight of this authority by contending that the act does not require discrimination but simply provides that a nondiscrimination assurance will be waived when separate facilities are provided for Negroes in the community. That the provision is cast in terms of a waiver permitted by government in no way changes its unconstitutionality. The Kansas statute ruled unconstitutional by this Court in *Brown* v. *Board of*

---

[18] *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 387 (4th Cir. 1955), aff'd 350 U. S. 877; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Gayle* v. *Browder*, 352 U. S. 903; *Bailey* v. *Patterson*, 369 U. S. 31; *Turner* v. *Memphis*, 369 U. S. 350; *New Orleans City Park Improvement Association* v. *Detiege*, 358 U. S. 54; *State Athletic Commission* v. *Dorsey*, 359 U. S. 533; *Johnson* v. *Virginia*, 373 U. S. 61.

Education, supra, authorized and did not require racial discrimination.[19]

As the act and regulations authorize the discrimination which the Court of Appeals found unconstitutional and enjoined, the constitutionality of the act and regulations are necessarily presented for decision. To the extent that the Constitution forbids racial discrimination by the hospitals, it also forbids statutory authorization of such discrimination.

To argue as do the hospitals that even if their conduct is subject to constitutional responsibility, respondents are not entitled to declaratory relief—declaring the statute which authorized such conduct unconstitutional—would be inconsistent as well as potentially confusing.[20] To be sure, settled principles of constitutional construction reflect judicial concern with *unnecessary* decisions of constitutional questions.[21] But there is no suggestion in the cases—and more important in the theory of judicial restraint underlying them—that a statute authorizing invalid conduct will

---

[19] See also *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726-27, Mr. Justice Stewart concurring; *McCabe* v. *Atchison Topeka and S. F. R. Co.*, 235 U. S. 151; cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Baldwin* v. *Morgan*, 287 F. 2d 754 (5th Cir. 1961); *Gantt* v. *Clemson Agricultural College of S. Car.*, 320 F. 2d 611 (4th Cir. 1963), cert. den. 375 U. S. 814.

[20] The United States argued forcefully in the district court that failure to adjudicate the constitutionality of the Act in such a context would subject the administration of the Act to uncertainty and subject the United States to possible liability for maladministration. "Not only is it unseemly for a high executive official of the United States to continue administering a statute which under the decisions of the courts seems clearly unconstitutional, but if the Surgeon General misconceives his legal obligations under the Act he may well subject himself to suit by those injured by his conduct." (Memorandum in support of Conclusions of Law Proposed by the United States, p. 21.)

[21] See *Ashwander* v. *Tenn. Valley Authority*, 297 U. S. 288, 345 et seq.

not be declared unconstitutional when the conduct itself is held unconstitutional. Such a result would turn a rule of avoidance of *unnecessary* constitutional decisions into a rule of abdication. Failure to declare the separate but equal provisions of the Hill-Burton Act unconstitutional would not be avoidance of a decision of "gravity and delicacy"[22] for fundamental reasons of political organization but a simple failure to articulate an inescapable conclusion. In *Turner* v. *Memphis*, 369 U. S. 350, relied on by the hospitals, a *state* statute might have, under a strained construction, permitted the conduct enjoined and the court was merely applying settled principles of comity in not construing the statute. Here, a federal statute authorizes unequivocally the racial segregation enjoined. Secondly, in *Turner* Negro plaintiffs did not seek a declaration of the unconstitutionality of the statute.

Apart from vague notions of judicial restraint, the hospitals suggest no viable theory upon which failure to adjudicate the constitutional question should be based. Negro physicians, dentists and patients surely have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens presentation of issues" which was said in *Baker* v. *Carr*, 369 U. S. 186, 204, to be the "gist of the question of standing." And it is not material that the hospitals did not rely explicitly on the Hill-Burton Act provision authorizing segregation. They have received the benefit of and acted in accordance with its terms, and they have defended the practice which the statute authorizes. The constitutionality of a statute of the United States is inescapably bound up in this litigation, and the question is not avoided because it is not fully articulated in a defensive pleading. The hospitals did not defend explicitly on the basis of the validity of

[22] *Ibid.*

their statutory authorization to segregate because decisions of this Court made the success of such an argument improbable. Any suggestion that this constitutional question is not shaped by the record is without merit.

In summary, the decision below accords with principles recently articulated by this Court. There is no conflict of circuits; nor is there any other persuasive reason why certiorari should be granted.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondents pray that the writ of certiorari be denied.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
Suite 2030
10 Columbus Circle
New York, N. Y. 10019

CONRAD O. PEARSON
203½ East Chapel Hill Street
P. O. Box 1428
Durham, North Carolina

Attorneys for G. C. Simkins, et al.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 776

MOSES H. CONE MEMORIAL HOSPITAL, ET AL.,
PETITIONERS

v.

G. C. SIMKINS, ET AL., AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

1. The Negro respondents in this case—who are physicians, dentists, and persons in need of medical or dental treatment—filed this action in the United States District Court for the Middle District of North Carolina to secure the desegregation of the Moses H. Cone Memorial Hospital and the Wesley Long Community Hospital in Greensboro, North Carolina. The complaint, in addition to requesting an order requiring non-discriminatory admissions to, and staff privileges at, the hospitals, also asked for a judgment declaring unconstitutional so much of the Hill-Burton Act (42 U.S.C. 291) as directs the Surgeon General (pursuant to an exception to

722-088—64

a broad non-discrimination clause) to authorize the construction of hospital facilities and the promotion of hospital services on a separate-but-equal basis (42 U.S.C. 291e(f)).[1] Since the proceeding was one in which "the constitutionality of * * * [an] Act of Congress affecting the public interest * * * [was] drawn in question," the United States intervened.[2] The government agreed with respondents that the separate-but-equal proviso in section 291e(f) should be declared unconstitutional and that an injunction should issue to restrain petitioners from discriminating on account of race or color.

The district court dismissed the complaint on the ground that petitioners were not subject to the prohibitions of the Fourteenth Amendment.[3] The Court of Appeals for the Fourth Circuit, sitting *en banc*, reversed (two judges dissenting), holding that the equal protection clause applied to petitioners; that this clause precluded petitioners from discriminating in their patient and staff admission policies on account of race or color; and that the separate-but-equal portion of the Hill-Burton Act was unconstitutional.

2. The Hill-Burton Act provides federal funds for the construction of governmentally-owned and voluntary nonprofit hospitals. The purpose of the statute is to assist the States to "afford the necessary physi-

[1] The Surgeon General issued the regulation contemplated in the statute (42 C.F.R. 53.112) and the complaint requested that this regulation, too, be declared unconstitutional.

[2] 28 U.S.C. 2403; Rule 24(a), F.R. Civ. P.

[3] The district court did not reach the question of the validity of the separate-but-equal proviso in the Act.

cal facilities for furnishing adequate hospital, clinic, and similar services to all their people" (42 U.S.C. 291(d)). Funds are allocated in accordance with a State-wide plan adopted by each participating State and administered by a State agency (42 U.S.C. 291b). The Act requires the States to set up detailed standards for maintenance and operation of participating hospitals, and these hospitals are under close and continuing supervision by the State. A total of $1,269,950 has been appropriated by the federal government to the Cone Hospital and $1,948,800 to the Long Hospital.

3. The government argued below—and the court of appeals agreed—that the Hill-Burton program necessitated such State "involvement"[4] in petitioner's activities that a correlative State responsibility, within the meaning of the Fourteenth Amendment, had to be imposed. In our view, this conclusion was correct.

a. Petitioners argue that they are being held to the equal-protection-clause standard solely because they were the beneficiaries of federal funds. Actually, the governmental involvement was much more pervasive. Any State participating in the Hill-Burton program assumes, as a State function, the obligation of planning for adequate hospital care for "all the people" of the State. The State may carry out its plan either through governmentally-owned or through private nonprofit hospitals; but when the plan is implemented in any particular area by the construction of voluntary nonprofit hospitals, Hill-Burton funds are unavailable *pro tanto* for the con-

[4] See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722.

struction of governmentally-owned hospitals. Thus, when a State admits a non-governmental institution into the plan, the latter performs one of the State's acknowledged functions. There is warrant for concluding that such an institution becomes, to that extent, a State instrumentality with concomitant obligations. Cf. *Marsh* v. *Alabama*, 326 U.S. 501; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461.

b. It seems clear, at a minimum, that the admission policies of participating hospitals are made a matter of governmental concern. Congress has regulated, and has authorized the Surgeon General to regulate, the admission practices of participating hospitals in the national interest. It has further provided that the several States regulate those policies and exact binding assurances as to the nature of those policies. The Surgeon General is required to participate in and direct the implementation of the congressional policy that Hill-Burton hospitals be available for the use of all the people, without discrimination. The final performance of the continuing obligation, imposed by the federal government and the State, falls on the hospital which renders the services. At least to the extent of their admission policies, therefore, the Act contemplates that the hospitals are to act as and for the State. What a hospial does with respect to race, creed, or color must therefore conform to the Fourteenth Amendment. Compare *McCabe* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 235 U.S. 151, 162; *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531, 535 (C.A. 5).

c. There are elements of State involvement other than those arising out of the Hill-Burton program. These are significant even though they would not be independently dispositive. Both hospitals operate under licenses granted by the State; both are exempt from *ad valorem* taxes; six of the fifteen trustees of Cone Hospital are appointed by the State or by public agencies; and the Cone Hospital trains nurses on behalf of State educational institutions. Both of the institutions in question have a decidedly public character. As a memorandum submitted to the district court by the General Counsel of the Department of Health, Education, and Welfare shows, they differ little from governmental hospitals except in the manner of selection of the governing boards and the lack of availability of tax funds to meet deficits. For that reason, there will be no drastic change under the court of appeals' decision in the character and the activities of the institutions involved except in the area of race relations.

4. The discrimination challenged in this case stems directly from the interrelated federal-State program in which each of the entities has played an indispensable part. Actually, it was the underlying federal statute which led to the North Carolina program of hospital construction of which the Cone and Long hospitals were substantial beneficiaries. If the discrimination is constitutionally impermissible, the statute which authorized both federal and State governments to sanction and participate in such discrimination is, to that extent, invalid. *McCabe* v. *Atchison, Topeka and Santa Fe Ry. Co., supra; Bolling* v.

Sharpe, 347 U.S. 497; *Western Union Telegraph Co.* v. *Foster*, 247 U.S. 105, 114; *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203; *Ming* v. *Horgan*, 3 R.R.L.R. 693, 699 (Cal. Super. Ct. 1958); *Baldwin* v. *Morgan*, 287 F. 2d 750, 754 (C.A. 5). Had the court of appeals decided this case against petitioners without passing upon the validity of the Hill-Burton proviso it would, in effect, have required petitioners to cease engaging in activities which are validated by federal law.

5. In the view of the United States, the court of appeals was correct in both aspects of its decision. We believe that the deep governmental involvement in the activities of petitioners called for application of the criteria of the Fifth and Fourteenth Amendments. If that is so, the court of appeals could not properly avoid the responsibility of declaring the Hill-Burton proviso unconstitutional. We do not urge, however, that the questions presented are unimportant or insubstantial. If, therefore, the Court entertains any serious doubts as to the correctness of the decision below, review would be appropriate.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

HAROLD H. GREENE,
HOWARD A. GLICKSTEIN,
Attorneys.

FEBRUARY 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964